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## ARTICLES

### TAFT, FRANKFURTER, AND THE FIRST PRESIDENTIAL FOR-CAUSE REMOVAL

*Aditya Bamzai* \*

In the fall of 1912—while one of the most consequential presidential campaigns in United States history raged around them—William Howard Taft, Felix Frankfurter, and a handful of officials within the federal government initiated a process to remove two members of the Board of General Appraisers (“Board”) for inefficiency, neglect of duty, and malfeasance in office.<sup>1</sup> The process culminated in President Taft’s for-cause dismissal of the two members, Thaddeus Sharretts and Roy Chamberlain, on the very last day that he served as President, after he received a report recommending their firing from a “committee of inquiry” that included Frankfurter.<sup>2</sup>

Taft’s firing of Sharretts and Chamberlain was the first presidential for-cause removal. To this day, it remains the only time in the history of the nation that the President has expressly removed for cause an executive branch “officer of the United States” whose tenure is protected by statute after providing notice to the officer,

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\* Associate Professor, University of Virginia School of Law. For helpful comments and encouragement, I owe thanks to Divya Bamzai, Emily Blair, Kate Boudouris, John Duffy, John Harrison, Tom Nachbar, Caleb Nelson, Sai Prakash, George Rutherglen, and the editors of the *University of Richmond Law Review*. All errors are my own. This article is adapted from a talk given at the *University of Richmond Law Review* Symposium: Defining the Constitution’s President Through Legal & Political Conflict (Oct. 27, 2017).

1. See JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY 6, 8 (2004) (describing the presidential election of 1912 as “a defining moment in American history,” which “tackled the central question of America’s exceptional destiny”).

2. See *infra* Part II.

holding a hearing, and finding that the statutory predicates for removal have been met. Taft's action involved decisions by two individuals—Taft himself and Frankfurter—who would go on to become Justices of the United States Supreme Court and to author two of the most consequential opinions on the President's authority to remove subordinates, *Myers v. United States*<sup>3</sup> and *Wiener v. United States*.<sup>4</sup> It involved the construction and application of statutory language—"inefficiency, neglect of duty, or malfeasance in office"—that Congress still uses to mark some kind of "independence" from presidential control on behalf of an administrative agency.<sup>5</sup> Echoes of the issues that Taft and Frankfurter confronted in 1913 may be heard in *Myers* and *Wiener*, in Justice Sutherland's opinion for the Court in *Humphrey's Executor v. United States*,<sup>6</sup> and in recent controversies over the scope of the President's power to remove subordinate officers within the executive branch.<sup>7</sup>

Despite all of the foregoing, the episode has escaped scholarly attention and been the subject of no relevant legal discussion.<sup>8</sup> No account of President Taft's removal of the two Board members appears in the various treatments of the President's removal power,<sup>9</sup> or in the large literatures devoted to Taft and Frankfurter, two

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3. 272 U.S. 52, 106 (1926).

4. 357 U.S. 349, 351 (1958).

5. See, e.g., 5 U.S.C. § 1211(b) (2012) (providing for removal on grounds of "inefficiency, neglect of duty, or malfeasance in office" for the Office of Special Counsel); 12 U.S.C. § 5491(c)(3) (2012) (same for Consumer Financial Protection Bureau); 15 U.S.C. § 41 (2012) (Federal Trade Commission); see also JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 257 (7th ed. 2014) (observing that "[i]nefficiency, neglect of duty, or malfeasance in office" is a common formulation for statutory provisions limiting the removal of officers); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1144 (2000) (describing this language as "the prototype removal provision").

6. 295 U.S. 602 (1935).

7. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 77 (D.C. Cir. 2018) ("We granted *en banc* review to consider whether the federal statute providing the Director of the Consumer Financial Protection Bureau (CFPB) with a five-year term in office subject to removal by the President . . . is consistent with Article II of the Constitution."):

8. Passing reference to Taft's firing of Sharretts and Chamberlain may be found in BRAD SNYDER, *THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM* (2017). As Snyder observes, Taft appointed Frankfurter to a three-member committee "to investigate allegations of neglect and customs fraud against the Board," *id.* at 59, and, on the committee's recommendation, Taft later "fired two life-tenured members of the Board of Appraisers for cause," *id.* at 67.

9. See, e.g., J. DAVID ALVIS ET AL., *THE CONTESTED REMOVAL POWER, 1789–2010* (2013); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008); see also MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* (2015).

towering figures in American legal history.<sup>10</sup> Indeed, it is widely, but mistakenly, assumed that no President has ever removed an officer for cause and that (in the words of the dissenting opinion in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*) “it appears that no President has ever actually sought to exercise [the removal] power by testing the scope of a ‘for cause’ provision.”<sup>11</sup> As a corrective, this article tells the story of Taft’s for-cause removal of the two general appraisers on his last day in office, following a process started in the midst of his 1912 reelection battle with future President Woodrow Wilson and former President Theodore Roosevelt. It then explores the episode’s implications for present-day understandings of the development of the American administrative state and the doctrine of the separation of powers. There are three reasons to engage in a study of this particular episode.

First, drawing on previously unexplored documents from the papers of Taft and Frankfurter, the narrative touches on one of the earliest and most central debates of constitutional law—the disputed existence, and disputed scope, of the President’s ability to fire subordinates within the executive branch. In 1789, the First Congress engaged in an extensive and sophisticated debate on the President’s power to control the executive branch by removing subordinates.<sup>12</sup> Over 200 years later, in *Free Enterprise Fund*, the Supreme Court stressed “the importance of removal as a tool of supervision,” describing it as “perhaps *the* key means” by which the President protects the constitutional prerogatives of the executive branch.<sup>13</sup> Yet notwithstanding the longstanding and central nature of this debate, the contours of the President’s removal power remain unsettled as both a constitutional and statutory matter. As a constitutional matter, the precise rule emerging from the Court’s precedents on this question—two of which, *Myers* and *Wiener*, were

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10. For works on Frankfurter, see, for example, LIVA BAKER, *FELIX FRANKFURTER* (1969); H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981); MICHAEL E. PARRISH, *FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS* (1982); HELEN S. THOMAS, *FELIX FRANKFURTER: SCHOLAR ON THE BENCH* (1960). For works on Taft, see, for example, DONALD F. ANDERSON, *WILLIAM HOWARD TAFT: A CONSERVATIVE’S CONCEPTION OF THE PRESIDENCY* (1973); HERBERT S. DUFFY, *TAFT* (1930); HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT: A BIOGRAPHY* (1939).

11. 561 U.S. 477, 524–25 (2010) (Breyer, J., dissenting).

12. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *CORNELL L. REV.* 1021, 1072 (2006).

13. *Free Enter. Fund*, 561 U.S. at 499, 501; *id.* at 484 (holding that “multilevel protection from removal . . . contravenes the President’s ‘constitutional obligation to ensure the faithful execution of the laws’” (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988))).

written by Taft and Frankfurter—is disputed. As a statutory matter, the meaning of the terms “inefficiency, neglect of duty, or malfeasance in office”—which Congress often uses to restrict the President’s power to remove subordinates—is likewise disputed.<sup>14</sup>

The actions of the executive branch—and of President Taft specifically—during the events of 1912 and 1913 can illuminate these disputed legal questions. In general, separation-of-powers jurisprudence relies on the practices of the political branches to interpret ambiguous legal text.<sup>15</sup> Against the backdrop of this interpretive principle, Taft’s 1913 dismissal of the two general appraisers is a crucial data point on the scope and meaning of the statutory terms limiting removal to “inefficiency, neglect of duty, or malfeasance in office.” Indeed, it is a *unique* data point because, although it is common for the President to fire executive branch officers who serve at will, it is rare for the President to remove an officer who occupies a position subject to statutory tenure protection. Subsequent to Taft’s actions in 1913, only one other President has fired an executive branch officer “for cause,” albeit without following the procedures or creating the record that Taft did.<sup>16</sup> As a result, Taft’s 1913 dismissal of Sharretts and Chamberlain provides vital evidence for present-day understandings of the scope of the terms “inefficiency,” “neglect of duty,” and “malfeasance in office.” In this regard, as explained further below, the committee that Taft appointed produced a report that viewed various forms of self-dealing and “incompetence” as amounting to “inefficiency,” “neglect of duty” and “malfeasance in office.”<sup>17</sup>

Second, the narrative involves a component of the Department of the Treasury—the Board of General Appraisers—which was,

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14. For a recent discussion of the confusion surrounding these terms, see *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 126–27 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring); *id.* at 127 (“In spite of the repeated use of the . . . standard throughout the U.S. Code and its prominent role in *Humphrey’s Executor*, the meaning of the standard’s three grounds for removal remains largely unexamined.”).

15. See, e.g., *NLRB v. Noel Canning*, 573 U.S. \_\_\_, \_\_\_, 134 S. Ct. 2550, 2559 (2014) (stating that, where “the interpretive questions before [the Court] concern the allocation of power between two elected branches of Government,” “we put significant weight upon historical practice” (emphasis omitted)); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”).

16. That President was Richard Nixon, who in 1969 dismissed Raymond Lapin, the President of the Federal National Mortgage Association. See BREGER & EDLES, *supra* note 9, at 155; *infra* notes 330–34 and accompanying text.

17. See *infra* Part II.B.

during an era of high tariffs and no income tax, one of the most powerful entities within the federal government. Until the ratification of the Sixteenth Amendment to the Constitution in 1913—which permitted the imposition of direct income taxes—“customs duties . . . accounted for between 50 and 90 percent of total Federal income.”<sup>18</sup> As Representative Oscar Underwood put it during a 1908 debate, the general appraisers “passe[d] on all the goods and the status of the goods that come into the United States from abroad” and therefore comprised “the most important Board in the United States, so far as the revenue of the Government was concerned.”<sup>19</sup> Nevertheless, despite the Board’s significance to federal governance at the time of its creation in 1890 and for many years thereafter, it now rests in relative obscurity, overshadowed by the more famous Interstate Commerce Commission created just three years earlier in 1887.<sup>20</sup>

In two significant ways, the Board’s creation and development provide a window into American institution building at the turn of the twentieth century. First, like the statute creating the Interstate Commerce Commission in 1887,<sup>21</sup> the statute creating the Board in 1890 authorized removal for “inefficiency, neglect of duty, or malfeasance in office.”<sup>22</sup> Second, during the legislative debates accompanying the creation of the Board, members of Congress disputed the constitutionality of eliminating judicial and jury trial rights associated with challenging customs determinations—while lodging review of those determinations in an administrative body, the Board, housed in the Treasury Department.<sup>23</sup> The establishment and development of the Board thus illustrate the deep connection between the introduction of “good cause” removal restrictions in federal statutory law and the creation of what are known as “non-Article III” adjudicative bodies within the executive

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18. JOHN M. DOBSON, *TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION 1* (1976); *see also* U.S. CONST. amend. XVI.

19. 42 CONG. REC. 5038 (1908) (statement of Rep. Underwood) (analogizing the Board to a “justice of the peace court”).

20. MASHAW ET AL., *supra* note 5, at 5 (“It is common to trace the beginning of modern U.S. public administration to 1887, a year . . . in which Congress created the Interstate Commerce Commission . . .”).

21. Interstate Commerce Act of 1887, ch. 104, § 11, 24 Stat. 379, 383.

22. Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136; *see* PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 121 (D.C. Cir. 2018) (Wilkins, J., concurring) (“Congress first used ‘inefficiency, neglect of duty, or malfeasance in office’ as a removal standard for officers of the Interstate Commerce Commission and the General Board of Appraisers in 1887 and 1890, respectively.”).

23. *See infra* Part I.C.1.

branch.<sup>24</sup> The rise of restrictions on the President's removal authority accompanied the shift in adjudication from common-law actions and jury trials to executive branch tribunals like the Board.

The third and final reason: the narrative involves a series of personalities who dominated two generations of American legal thought. Taft and Frankfurter, the primary actors in the drama of 1912 and 1913, became Supreme Court Justices and wrote *Myers* and *Wiener*. Along the way, the narrative involves Senator George Sutherland and Representative Joseph McKenna, both of whom were later appointed to the Supreme Court and one of whom wrote *Humphrey's Executor*. This article is an intellectual history of these larger-than-life figures before they authored the Supreme Court opinions that define the scope of the President's removal power.

Part I of this article lays out the background on the legal question—summarizing the three central cases on the President's authority to remove subordinates prior to the latter half of the twentieth century, the tariff system in the United States, and the creation and development of the Board. Part II of this article addresses the events of 1912 and 1913, when President Taft, assisted by a thirty-year-old Felix Frankfurter, fired two of the members of the Board. Part III concludes the story with the aftermath of the events of 1913; assesses the relevance of the episode to our understanding of *Myers*, *Humphrey's Executor*, and *Wiener*; and provides some thoughts on the relevance of the episode to current disputes about the President's removal power.

## I. THE LEGAL AND STATUTORY BACKDROP

Before turning to Taft's removal of the two members of the Board in the waning hours of his presidency, it is helpful to study the legal and statutory framework governing the controversy. This part does that in three sections. First, Part I.A sets out the legal

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24. The Board was therefore an example of a body within the executive branch that "adjudicates" cases, much like an Article III court, but composed of officers who lacked the tenure and salary protections Article III confers on judges. RICHARD H. FALLON, JR. ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 34, 36 (7th ed. 2015); see U.S. CONST. art. III, § 1. For cases addressing the authority of executive branch bodies to make conclusive determinations (or "adjudicate") disputes that look like Article III "cases" or "controversies," see *Stern v. Marshall*, 564 U.S. 462, 489–90 (2011) (contrasting cases involving "public rights," which may be conclusively decided by executive branch entities, with those that are matters of "private right" and must be resolved in Article III courts); *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932).

framework governing the President's removal authority over subordinate executive branch officers—a framework that, as explained below, was established in part by two of the main actors in this article, Taft and Frankfurter. In addition, Part I.A discusses the present controversy about the meaning of statutory removal provisions limiting the President's authority to fire a subordinate to “inefficiency, neglect of duty, or malfeasance in office.” Second, Part I.B sets out a brief history of the development of the tariff and its administration up until the creation of the Board. Third, Part I.C discusses the formation and development of the Board until the Taft presidency.

### A. *The Legal Status of the “Independent” Agencies*

The place of “independent” agencies within the three branches of government is one of the central concerns of scholarship on the Constitution's separation of powers. These bodies—considered independent because statutory provisions protect the tenure of agency heads—span a wide variety of substantive areas.<sup>25</sup> Broadly speaking, they raise two legal questions: First, are statutory limitations on the President's authority to remove subordinates constitutional? And second, assuming such statutory provisions are constitutional, precisely how much do they limit the President's discretion in removing subordinates?

#### 1. Constitutional Framework

The Constitution does not expressly specify the tenure of or means of removing subordinate executive branch officers. Article II vests the “executive Power” in a “President of the United States of America,” who has the authority to “take Care that the Laws be faithfully executed” and “nominate, and by and with the Advice and Consent of the Senate, . . . appoint” officers of the executive branch.<sup>26</sup> Each house of Congress has the authority to “expel”—or, one might say, to remove—one of its own members by a two-thirds vote.<sup>27</sup> Congress also has the authority to remove the President,

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25. ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 3, 760–61 (1941); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 *CORNELL L. REV.* 769, 771 (2013).

26. U.S. CONST. art. II, §§ 1–3.

27. *Id.* art. I, § 5, cl. 2 (“Each House may . . . , with the Concurrence of two thirds, expel a Member.”).



Vice President, and all other civil officers through impeachment by the House of Representatives and conviction by the Senate.<sup>28</sup> In addition, the Constitution *does* create federal officers with guaranteed “good Behaviour” tenure—namely, the judges who wield the “judicial Power of the United States” and populate the “one supreme Court” and “inferior Courts [that] the Congress may from time to time ordain and establish.”<sup>29</sup> Those judges “hold their Offices during good Behaviour” and “receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>30</sup> By implication, these provisions establish that Article III judges may be removed only by impeachment in the House and conviction by the Senate.<sup>31</sup>

The First Congress extensively debated (and some argue, settled) the appropriate inferences that could be drawn from these provisions of the structural Constitution for the question whether the President has plenary authority, under the Constitution, to remove subordinate executive branch officers.<sup>32</sup> The Supreme Court did not directly address the constitutional question until the twentieth century, at which point it decided three key precedents that continue to form the grounds for doctrinal debate in this area of law. The Board made an appearance in the litigation of each of the three cases.

In *Myers v. United States*, the Court—in an opinion by Chief Justice Taft—held that the President had the authority to remove subordinate executive branch officers whom he has appointed by and with the advice and consent of the Senate.<sup>33</sup> An 1876 statute provided that “[p]ostmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.”<sup>34</sup> Myers, a first-class postmaster, was removed before the end of his term by President Wilson without the Senate’s advice

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28. *Id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. II, § 4 (“The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of . . .”).

29. *Id.* art. III, § 1.

30. *Id.*

31. *See* *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

32. *See* Prakash, *supra* note 12, at 1072.

33. 272 U.S. 52, 106, 134 (1926).

34. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80.

and consent.<sup>35</sup> His estate then sued to recover his salary for the remainder of the term.<sup>36</sup> Chief Justice Taft's opinion reasoned that the vesting of the executive power in the President was essentially a grant of the power to execute the laws, which necessarily included the power to remove subordinate officials.<sup>37</sup>

In the course of the opinion, Taft addressed whether Congress's creation of "administrative boards" subject to "provisions for the removal of the members for specified causes" was "inconsistent with the independent power of removal by the President."<sup>38</sup> Taft concluded that the claim was "unfounded" because of the Court's 1903 decision in *Shurtleff v. United States*,<sup>39</sup> which held that the 1890 statute authorizing the President to remove members of the Board for "inefficiency, neglect of duty, or malfeasance in office" did not prohibit the President from removing an appraiser for other reasons.<sup>40</sup> Taft understood *Shurtleff* as "an indication that many of the statutes" requiring for-cause removal "are to be reconciled to the unrestricted power of the President to remove."<sup>41</sup> In dissent, Justice Brandeis agreed that, under *Shurtleff*, provisions simply authorizing removal for "inefficiency, neglect of duty, [or] malfeasance in office" did not restrict "the President's power to remove for other than the causes specified."<sup>42</sup>

In *Humphrey's Executor v. United States*, the Court distinguished *Myers*, as well as *Shurtleff*, and held that Congress could limit the President's authority to remove the Commissioners of the Federal Trade Commission.<sup>43</sup> The statute establishing the Federal Trade Commission ("FTC") provided that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or

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35. *Myers*, 272 U.S. at 106–07.

36. *Id.* at 106.

37. *Id.* at 117.

38. *Id.* at 171.

39. *Id.* (relying on the Court's precedent in *Shurtleff v. United States*, 189 U.S. 311 (1903)).

40. *See Shurtleff*, 189 U.S. at 318–19.

41. *Myers*, 272 U.S. at 172. Taft acknowledged "later acts . . . in which, doubtless, the inconsistency with the independent power of the President to remove is clearer," presumably because Congress specified removal "for cause" and for no other reason. *Id.* But he argued that these other statutes had "not . . . really . . . received the acquiescence of the executive branch of the Government." *Id.*

42. *Id.* at 262 n.30 (Brandeis, J., dissenting). As explained below, Congress amended the Board of General Appraisers statute after *Shurtleff* to limit the President's removal authority to the three specified reasons "and no other." *See infra* Part I.C.3.

43. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 621–23, 626–29, 631–32 (1935).

malfeasance in office.”<sup>44</sup> President Hoover had appointed William E. Humphrey to a seven-year term on the FTC ending in 1938, but President Roosevelt removed him in 1933 because, as Roosevelt put it in a letter: “I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission.”<sup>45</sup> After Humphrey died, his estate pursued a lawsuit for his salary in the Court of Claims.<sup>46</sup>

Writing for the Supreme Court, Justice Sutherland reasoned that the President lacked the authority to remove a commissioner other than for the three grounds specified in the statute,<sup>47</sup> and that this limitation on the President’s removal authority was constitutional.<sup>48</sup> In concluding that the statute limited the President’s ability to remove commissioners, the Court distinguished *Shurtleff*’s holding that the 1890 statute authorizing the President to remove members of the Board for “inefficiency, neglect of duty, or malfeasance in office” did not prohibit removal for other reasons.<sup>49</sup> Though the operative language in the Board and FTC statutes was the same—“inefficiency, neglect of duty, or malfeasance in office”—Justice Sutherland concluded that the statutory schemes, taken as a whole, were different. According to Sutherland, *Shurtleff* had held that the three listed bases were not exclusive in the Board statute because “no term of office was fixed by the act.”<sup>50</sup> If *Shurtleff* had held that a member of the Board possessed “the right to hold office during his life or until found guilty of some act specified in the statute, the result . . . would be a complete revolution,” because (apart from Article III judges) “no civil officer had ever held office by life tenure since the foundation of the government.”<sup>51</sup> Because the FTC statute specified a term of years for commissioners, Sutherland concluded, Humphrey’s case was “wholly different” from *Shurtleff*’s.<sup>52</sup> As a result, *Humphrey’s Executor* held that ordinarily “the fixing of a definite term subject to removal for

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44. Federal Trade Commission Act, Pub. L. No. 63-203, § 1, 38 Stat. 717, 718 (1914).

45. *Humphrey’s Ex’r*, 295 U.S. at 618–19.

46. *Id.* at 618.

47. *Id.* at 618, 621–26 (distinguishing *Shurtleff*).

48. *See id.* at 626–32 (distinguishing *Myers*).

49. *See id.* at 621–23; *see also* *Shurtleff v. United States*, 189 U.S. 311, 318–19 (1903).

50. *See Humphrey’s Ex’r*, 295 U.S. at 622.

51. *Id.* *Shurtleff* contained some language to this effect. *See Shurtleff*, 189 U.S. at 316 (declining to “attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office”).

52. *Humphrey’s Ex’r*, 295 U.S. at 623.

cause . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause.”<sup>53</sup>

Sutherland gave a second reason for construing the FTC statute to limit the President’s authority to the three enumerated bases. According to him, the FTC was “to be non-partisan; and . . . from the very nature of its duties, [to] act with entire impartiality,” with the commissioners “charged with the enforcement of no policy except the policy of the law.”<sup>54</sup> The *Humphrey’s Executor* opinion famously described the FTC’s duties as “neither political nor executive, but predominantly quasi-judicial and quasi-legislative.”<sup>55</sup> Sutherland derived that description of the FTC’s duties from legislative committee reports, which “clearly reflect[ed] the view that a fixed term was necessary to the effective and fair administration of the law.”<sup>56</sup>

Some decades later, in *Wiener v. United States*, the Court held that the President lacked the authority to remove members of the War Claims Commission, a body created by Congress to adjudicate claims for compensating certain internees, prisoners of war, and religious organizations that suffered injuries at the hands of the country’s enemies during World War II.<sup>57</sup> President Truman appointed Wiener (with the advice and consent of the Senate) to the three-member body in 1950, but President Eisenhower fired him in 1953.<sup>58</sup> Like the estates of Myers and Humphrey before him, Wiener filed a suit for backpay in the Court of Claims contending that his removal was illegal.<sup>59</sup> Unlike the statutes at issue in both *Myers* and *Humphrey’s Executor*, however, the statutory scheme establishing the War Claims Commission “made no provision for removal of a Commissioner.”<sup>60</sup> As a result, the government contended, the case was controlled by the Court’s decision in *Shurtleff*, which required “a clear statutory provision to the contrary” before

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53. *Id.*

54. *Id.* at 624.

55. *Id.*

56. *Id.* As it happens, Justice Sutherland had been a participant in the legislative debates leading to the creation of the FTC as a Senator from the State of Utah. See CUSHMAN, *supra* note 25, at 445.

57. 357 U.S. 349, 349–50, 356 (1958) (citing the War Claims Act of 1948, ch. 826, §§ 3, 5–7, 62 Stat. 1240, 1241–45).

58. *Id.* at 350.

59. *Id.* at 349.

60. *See id.* at 350.

a limit to the President's power to remove could be established, including for "judges" who comprised tribunals such as the Board of General Appraisers.<sup>61</sup>

Writing for a unanimous Court, Justice Frankfurter reasoned that the lack of an express removal restriction was irrelevant because the statute's silence was simply an instance in which appropriate inferences "must be drawn from congressional failure of explicitness."<sup>62</sup> Taft's opinion in *Myers*, according to Justice Frankfurter, involved "obviously an executive official,"<sup>63</sup> and did not (pursuant to *Humphrey's Executor*) extend to removal of members of "quasi-judicial bodies."<sup>64</sup> *Humphrey's Executor*, according to Frankfurter,

drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus removable by virtue of the President's constitutional powers, and those who are members of a body "to exercise its judgment without the leave or hindrance of any other official or any department of the government."<sup>65</sup>

The key question for the Court, Frankfurter concluded, was "the difference in functions between those who are part of the Executive establishment and those whose tasks require absolute freedom from Executive interference."<sup>66</sup> The Court held that, in creating the War Claims Commission, Congress sought to establish "an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof, with finality of determination 'not subject to review by any other official of the United States or by any court

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61. Brief for the United States at 31–32, *Wiener*, 357 U.S. 349 (No. 52); see *id.* at 75–77 (relying extensively on *Shurtleff*).

62. *Wiener*, 357 U.S. at 349, 352.

63. *Id.* at 351.

64. *Id.* at 352 (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626–27 (1935)). Justice Frankfurter contended that the *Myers* "Court announced that the President had inherent constitutional power of removal also of officials who have 'duties of a quasi-judicial character . . . whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.'" *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 135 (1926)). Frankfurter reasoned that, if Congress intended to bar

the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

*Id.* at 356.

65. *Id.* at 353 (quoting *Humphrey's Ex'r*, 295 U.S. at 625–26).

66. *Id.*

by mandamus or otherwise.”<sup>67</sup> Frankfurter did not mention *Shurtleff* in the course of the opinion.

Later cases elaborated on the holdings of *Myers*, *Humphrey’s Executor*, and *Wiener*. In *Morrison v. Olson*, the Court appeared to abandon *Humphrey’s Executor’s* distinction between “purely executive” and “quasi-judicial” or “quasi-legislative” officers, holding that the appropriate inquiry depended not on “rigid categories,” but rather on whether Congress “interfere[d] with the President’s” constitutional powers or “impede[d] the President’s ability to perform his constitutional duty.”<sup>68</sup> In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court held that two layers of for-cause protection violated the Constitution, even if one might be permissible under *Humphrey’s Executor*.<sup>69</sup> But *Myers*, *Humphrey’s Executor*, and *Wiener* remain central to constitutional doctrine. Two of the cases, *Myers* and *Wiener*, were written by the crucial players in the events of 1912 and 1913, President Taft and Felix Frankfurter,<sup>70</sup> and the third case, *Humphrey’s Executor*, was written by George Sutherland, who had a role as a spectator of the events from his seat as a senator during the relevant debates.<sup>71</sup>

## 2. Statutory Framework

In addition to constitutional concerns, provisions limiting the President’s authority to remove an officer may present legal questions about the meaning of the “inefficiency, neglect of duty, or malfeasance in office” language that Congress often uses to mark “independence” from the President. The Supreme Court’s jurisprudence has been surprisingly silent on this statutory question. In *Humphrey’s Executor*, President Roosevelt had previously written letters to Commissioner Humphrey expressing the views that

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67. *Id.* at 354–55 (quoting the War Claims Act of 1948, ch. 826, § 11, 62 Stat. 1240, 1246); *see id.* at 355 (reasoning that Congress could have authorized a court to adjudicate the claims and “[t]he fact that it chose to establish a Commission to ‘adjudicate according to law’ . . . did not alter the intrinsic judicial character of the task with which the Commission was charged”).

68. *Morrison v. Olson*, 487 U.S. 654, 689–91 (1988); *see id.* at 692–93 (evaluating whether a removal restriction “impermissibly burdens” or “interfere[s] impermissibly” with the President’s constitutional obligations).

69. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–96 (2010).

70. *Wiener*, 357 U.S. at 349; *Myers v. United States*, 272 U.S. 52, 106 (1926).

71. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 618 (1935); *see* HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND: RESTORING A JURISPRUDENCE OF NATURAL RIGHTS* 15–18 (1994) (recounting Sutherland’s time in the Senate).

the President wanted “personnel of [his] own selection” on the FTC and that “[Humphrey’s] mind and [his] mind [did not] go along together on either the policies or the administering of the Federal Trade Commission.”<sup>72</sup> In the ultimate order of removal, however, the President did not purport to satisfy any of the statutory grounds for removal,<sup>73</sup> and thus the precise scope of the statutory language was not an issue presented to the Court.<sup>74</sup>

In *Bowsher v. Synar*,<sup>75</sup> the Court understood the statute authorizing Congress to remove the Comptroller General for several statutory grounds—including “inefficiency,” “neglect of duty,” and “malfeasance” in office—as being “very broad” and capable of sustaining removal “for any number of actual or perceived transgressions of the legislative will.”<sup>76</sup> In *Morrison v. Olson*, the Court described a provision authorizing removal for “good cause” as conferring “ample authority to assure that [a subordinate officer] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.”<sup>77</sup> At the same time, in *Free Enterprise Fund*, the Court claimed that if officers in a multimember commission are protected against removal under a statutory standard similar to that in *Humphrey’s Executor*, then the President may not remove the officers merely where “the President disagrees with their determination” in a particular matter.<sup>78</sup>

Given the lack of clarity in Supreme Court cases, lower courts have struggled with this question. In *PHH Corp. v. Consumer Financial Protection Bureau*, the en banc D.C. Circuit Court of Appeals upheld the constitutionality of a statute providing that the President may remove the Director of the Consumer Financial Protection Bureau for “inefficiency, neglect of duty, or malfeasance in

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72. *Humphrey’s Ex’r*, 295 U.S. at 618–19.

73. *Id.* at 619.

74. See *Bowsher v. Synar*, 478 U.S. 714, 729 n.8 (1986) (noting that in *Humphrey’s Executor*, “the President did not assert that he had removed the Federal Trade Commissioner in compliance with one of the enumerated statutory causes for removal” (citing *Humphrey’s Ex’r*, 295 U.S. at 612 (argument of Solicitor General Reed)); see also WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 60–62 (1996) (indicating that Roosevelt regretted failing to specify cause for Humphrey’s removal).

75. 478 U.S. at 726–28 (holding unconstitutional Congress’s delegation of executive authority to the Comptroller General because Congress could remove him by joint resolution).

76. *Id.* at 729.

77. 487 U.S. 654, 692 (1988).

78. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010).

office.”<sup>79</sup> In an opinion concurring in the judgment, Judge Griffith argued that the “inefficiency, neglect of duty, or malfeasance in office” standard imposes “only a minimal restriction on the President’s removal power, even permitting him to remove the Director for ineffective policy choices.”<sup>80</sup> To understand the terms, Judge Griffith’s opinion relied on dictionary definitions of the statutory terms, state-law cases, and legislative debates.<sup>81</sup> Based on these sources, Judge Griffith understood “malfeasance” to mean “the doing of that which ought not to be done; wrongful conduct, especially official misconduct; violation of a public trust or obligation; specifically the doing of an act which is positively unlawful or wrongful, in contradistinction to misfeasance.”<sup>82</sup> He understood “neglect of duty” to mean “failure to do something that one is bound to do.”<sup>83</sup> And he understood inefficiency to mean failure “to produce or accomplish the agency’s ends, as understood or dictated by the President operating within the parameters set by Congress.”<sup>84</sup> In reaching these conclusions, Judge Griffith observed that he had not removed the “concept of ‘independence’ from ‘independent’ agen-

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79. 881 F.3d 75, 77 (D.C. Cir. 2018) (en banc); see 12 U.S.C. § 5491(c)(3) (2012).

80. *PHH Corp.*, 881 F.3d at 124 (Griffith, J., concurring). Judge Griffith contended that, “[u]ntil we know what these causes for removal mean and how difficult they are to satisfy, we cannot determine whether the CFPB’s novel structural features unconstitutionally impede the President in his faithful execution of the laws.” *Id.* at 126. As Judge Griffith’s opinion observes, attempting to discover the ordinary meaning of the “inefficiency, neglect of duty, or malfeasance in office” language poses a couple of conceptual difficulties. For one thing, Congress enacted statutes containing this language at various points in time—indeed, separated by over 100 years in the case of the Interstate Commerce Commission and the Consumer Financial Protection Bureau—thus raising the question whether the language should be given one uniform interpretation across the United States Code or different interpretations in the different statutes. See *id.* at 130–31 (quoting *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005), which stated that “[w]hen Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes” (second alteration in original)). For another, assuming (as Judge Griffith did) that Congress intends to give the “inefficiency, neglect of duty, malfeasance in office” language the same meaning in all statutes using those terms, there is a second question whether the meaning was fixed at the time the terms were first incorporated into federal statutory law in the Interstate Commerce Act in 1887—or at some earlier or later date. See *id.* at 130 (noting that “[g]enerally, the ordinary meaning of a statutory term is fixed at the time the statute was adopted”).

81. *Id.* at 130, 131–32 & nn.10–12, 133.

82. *Id.* at 131 (quoting *Malfeasance*, THE CENTURY DICTIONARY AND CYCLOPEDIA 3593 (1911)).

83. *Id.* (citing *Duty; Neglect*, A LAW DICTIONARY 404–05, 810 (Henry Campbell Black ed., 2d ed. 1910)).

84. *Id.* at 134.



cies because agency independence is not a binary but rather a matter of degree.”<sup>85</sup> Responding to Judge Griffith’s concurrence, Judge Wilkins agreed that “‘inefficiency’ provides a broad standard allowing for the removal of employees whose performance is found lacking,” including “incompetence or deficient performance.”<sup>86</sup> But he disagreed that “‘inefficiency’ is properly construed to allow removal for mere policy disagreements.”<sup>87</sup>

### B. *Tariff Rates and Tariff Administration*

Taft’s 1913 removal of Sharretts and Chamberlain occurred against the backdrop of political debates about tariff rates and tariff administration. To appreciate the significance of the Board (and, hence, the significance of Taft’s removal of two of its members), it is necessary to understand the role the tariff played in the political and economic development of nineteenth-century America.<sup>88</sup> All governments—indeed, almost all collective enterprises—depend, in some way, on the ability to pool resources to pursue a common end. Until the adoption of the income and corporate taxes in the twentieth century, the tariff was the principal mechanism by which the federal government financed itself.<sup>89</sup> As a result, tariff rates and tariff administration were two of the most politically salient issues throughout the nineteenth century.<sup>90</sup>

#### 1. Tariff Rates

The existence of a tariff of some sort on the North American continent predates the creation of the United States of America. The English sought to impose a tariff on American goods and, indeed,

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85. *Id.* at 136 (citation omitted).

86. *Id.* at 122 (Wilkins, J., concurring).

87. *Id.* at 123.

88. See EDWARD S. KAPLAN & THOMAS W. RYLEY, *PRELUDE TO TRADE WARS: AMERICAN TARIFF POLICY, 1890–1922*, at ix (1994); see also CARL E. PRINCE & MOLLIE KELLER, *THE U.S. CUSTOMS SERVICE: A BICENTENNIAL HISTORY*, at ii (1989) (observing that, in addition to enforcing tariff regulations and collecting duties, the Customs Service was “the nation’s first public health service, its first immigration service, and its first coast guard”).

89. See PRINCE & KELLER, *supra* note 88, at 36 (noting that customs duties provided eighty-eight percent of the national government’s revenue from 1789 to 1800). To use another metric, by 1792, the Customs Service had 146 officers and 332 subordinates, far more than any other civil establishment of the national government, and, by Thomas Jefferson’s election in 1801, the number of subordinate employees had increased to 944. *Id.* at 37.

90. See KAPLAN & RYLEY, *supra* note 88, at 1–4 (discussing the political environment of tariffs in the nineteenth century).

it was a series of missteps by the British Parliament on customs duties and enforcement that played a key role in fueling the American Revolution—first, the imposition of duties under the Stamp Act of 1765; then, the creation of the American Board of Customs Commissioners in the tinderbox town of Boston under the Townshend Act of 1767; and finally, the disastrous attempt to compel obedience under the Coercive Acts of 1774.<sup>91</sup> After the Constitution's adoption,<sup>92</sup> the creation of a national customs service was one of the early items debated in the House of Representatives, at which point James Madison argued that Congress's "first attention and united exertions" ought to be remedying the "deficiency in our Treasury" with "an impost on articles imported into the United States."<sup>93</sup> Congress enacted, and President Washington signed into law on July 31, 1789, a bill establishing the United States Customs Service.<sup>94</sup> The Tariff Act of 1789 imposed specific duties on certain goods (for example, eight to ten cents per gallon on spirits) and *ad valorem* duties on others (for example, a fifteen percent tax on carriages).<sup>95</sup>

Broadly speaking, there were two reasons to set high tariff rates. The first, as suggested by Madison, was simple: to fund the government. The second reason—protection of domestic industries—remains highly disputed to this day and would become the basis for substantial political controversy throughout the nation's first century. In his "Report on Manufactures," submitted to Congress

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91. See DALL W. FORSYTHE, *TAXATION AND POLITICAL CHANGE IN THE YOUNG NATION, 1781–1833*, at 10–13 (1977) (discussing how the Stamp Act of 1765 and the Townshend Act of 1767, among others, helped lead to the American Revolution); PRINCE & KELLER, *supra* note 88, at 1–34 (discussing how British customs in America contributed to the start of the American Revolution).

92. For a survey of American tariff practices from Independence to the adoption of the Constitution, see 1 JOHN D. GOSS, *THE HISTORY OF TARIFF ADMINISTRATION IN THE UNITED STATES: FROM COLONIAL TIMES TO THE MCKINLEY ADMINISTRATIVE BILL* 12–23 (2d ed. 1897); see also FORSYTHE, *supra* note 91, at 14–21 (discussing revenue and tax systems under the Articles of Confederation). The Constitution provided that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

93. William Von Raab, *Introduction* to PRINCE & KELLER, *supra* note 88, at v–vi.

94. Act of July 31, 1789, ch. 5, 1 Stat. 29 ("An Act to regulate the Collection of the Duties . . ."); see also Act of July 4, 1789, ch. 2, 1 Stat. 24 ("An Act for laying a Duty on Goods, Wares and Merchandises . . .").

95. PERCY ASHLEY, *MODERN TARIFF HISTORY: GERMANY—UNITED STATES—FRANCE* 134 (3d ed. 1920).

in December 1791, Alexander Hamilton provided a classic exposition of the arguments for a protective tariff.<sup>96</sup> Hamilton contended that a protective (not merely revenue-raising) tariff was desirable for several reasons. First, Hamilton claimed, “[e]very nation . . . ought to endeavor to possess within itself all the essentials of national supply,” such as “the means of subsistence, habitation, clothing, and defense.”<sup>97</sup> Second, Hamilton argued that a protective tariff would encourage “an extensive domestic market for the surplus produce of the soil.”<sup>98</sup> Third, Hamilton argued that America’s infant industries would “struggle against the force of unequal terms”—namely, the established industries of European powers.<sup>99</sup> Finally, Hamilton claimed that any temporary increase in prices resulting from the tariff would soon be overtaken by a decrease in prices from the resulting increase in domestic production.<sup>100</sup>

By the time tariff bills were enacted in 1819, 1824, and 1828, the question had become embroiled in party and sectional politics. Southern interests generally favored lower rates, and mid-Atlantic interests favored higher rates.<sup>101</sup> Famously, in 1832, a state convention in South Carolina gathered to declare the Tariff Acts of 1828 and 1832 to be void within the state, under the theory that each individual state had the authority to nullify unconstitutional acts (as perceived by that state) of the federal government.<sup>102</sup> Following an interlude during the Civil War, the tariff returned as a major issue—and a partisan one at that.<sup>103</sup> Expecting heavy losses at the polls in 1875, Republicans elected to pursue a last-ditch effort to entrench high protective rates before losing control of Congress. Following that point, “[a]t almost every succeeding period of congressional or presidential election until 1896 the tariff was an

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96. *See id.* at 136.

97. ALEXANDER HAMILTON, REPORT ON MANUFACTURES TO THE HOUSE OF REPRESENTATIVES, H.R. REP. NO. 63-172, at 33 (1791).

98. *Id.* at 16.

99. *See id.* at 20.

100. *Id.* at 44; ASHLEY, *supra* note 95, at 136–37.

101. ASHLEY, *supra* note 95, at 146 n.3, 147, 150–51.

102. *Id.* at 158. Whether levying of import duties for protective purposes was constitutionally within the power of Congress was the subject of controversy. *See* 1 EDWARD STANWOOD, AMERICAN TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY 220–25 (1903).

103. ASHLEY, *supra* note 95, at 182.

issue in the canvass, to the great disturbance and distress of business, and during the short period of fourteen years, from 1883 to 1897, there were four complete revisions of the tariff.”<sup>104</sup>

In 1887, President Grover Cleveland, in his annual address to Congress, unequivocally embraced a platform of lower duties—thus effectively making it the policy of his Democratic Party, which had hitherto been divided on the subject.<sup>105</sup> Cleveland argued that, while the tariff “must be extensively continued as the source of the Government’s income,” the tariff should not “always insure the realization of immense profits, instead of moderately profitable returns.”<sup>106</sup> In his view, the “simple and plain duty which [the national government] owe[d] to the people, [was] to reduce taxation to the necessary expenses of an economical operation of the Government.”<sup>107</sup> Cleveland’s message prompted competing bills by Republicans and Democrats and, “[f]rom that time on, the tariff question became the chief line of division between the two great political parties.”<sup>108</sup>

## 2. Tariff Administration

Against this backdrop, it should come as no surprise that administering the tariff system was difficult. To assess accurately an *ad valorem* tax on an item subject to a protective tariff required an “intimate knowledge of its innumerable grades, qualities and textures; an extensive acquaintance with foreign markets, with freight rates, commissions, insurance and a multitude of details

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104. 2 EDWARD STANWOOD, *AMERICAN TARIFF CONTROVERSIES IN THE NINETEENTH CENTURY* 191 (1903).

105. See KAPLAN & RYLEY, *supra* note 88, at 1–2.

106. EDWARD MCPHERSON, *A HAND-BOOK OF POLITICS FOR 1888: BEING A RECORD OF IMPORTANT POLITICAL ACTION, EXECUTIVE AND LEGISLATIVE, NATIONAL AND STATE, FROM JULY 31, 1886, TO AUGUST 31, 1888*, at 93 (1888).

107. E. Benjamin Andrews, *A History of the Last Quarter-Century in the United States*, 19 SCRIBNER’S MAG. 60, 80 (1896).

108. ASHLEY, *supra* note 95, at 198 n.1 (quoting RICHMOND MAYO-SMITH & EDWIN R.A. SELIGMAN, *THE COMMERCIAL POLICY OF THE UNITED STATES OF AMERICA, 1860–1890*, at 23 (1892)); see IDA M. TARBELL, *THE TARIFF IN OUR TIMES* 155–80 (1911) (discussing the two resulting, competing bills: the Democrats’ Mills Bill and the Republicans’ Allison Bill); see also ASHLEY, *supra* note 95, at 198 (noting that “[t]he message established a distinct line of division between political parties . . . and it provided a clear and definite issue for the Presidential election of November, 1888”); TARBELL, *supra*, at 154 (noting that “[t]he immediate important political result of [Cleveland’s] message was that it crystallized tariff sentiment in both parties”); F.W. TAUSSIG, *TARIFF HISTORY OF THE UNITED STATES* 253 (8th ed. 1931) (reasoning that Cleveland’s message made the tariff “question more distinctly a party matter than it had been at any time since the Civil War”).

imperfectly acquired even by a lifelong business experience.”<sup>109</sup> Enforcing the customs acts, thus, required officials who possessed a great deal of expertise and who were vested with a great deal of discretion.

Early customs acts created several officers—collectors, naval officers, surveyors, and deputy collectors—to enforce the tariff laws.<sup>110</sup> But for all the administrative complexity, before 1818, the law customarily accepted an invoice submitted by the importer as showing the dutiable value of the goods.<sup>111</sup> In 1818, however, Congress created the office of “appraiser,” authorizing the President to appoint two such officers at each of the ports of Boston, New York, Philadelphia, Charleston, and New Orleans.<sup>112</sup> These appraisers

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109. GOSS, *supra* note 92, at 8 (“[T]he adoption of the policy of protection . . . and the very general introduction of *ad valorem* rates vastly complicated the problem.”).

110. *Id.* at 24–32 (surveying early tariff administration structure). The enforcement framework implicates two additional issues of relevance to administrative law scholars. First, in the early Republic, “[t]he salaries of officers were supposed to be paid out of the moneys received from fees” unless those fees were inadequate, in which case they were “paid directly out of the revenue.” *Id.* at 54; *see* Act of Mar. 3, 1849, ch. 110, § 1, 9 Stat. 398, 398 (providing that the “gross amount of all duties received from customs . . . shall be paid by the officer or agent receiving the same into the treasury of the United States . . . without any abatement or deduction on account of salary”); *see also* Act of May 12, 1870, ch. 102, § 2, 16 Stat. 122, 123 (providing that collectors were to receive certain fixed salaries). The transition from “profit motive” to salaried employee thus furnishes an important example of the changing nature of funding for federal functions. *See* NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 1 (2013). Second, customs officers initially obtained a warrant from a justice of the peace to enter private premises, to seize goods on unpaid duties, and to remain and to remove for inspection any books or papers containing relevant information. Act of Mar. 2, 1799, ch. 22, § 68, 1 Stat. 627, 677–78; GOSS, *supra* note 92, at 60. In 1863, Congress authorized United States District Court Judges to issue warrants on affidavit that an importer had committed or attempted fraud. Act of Mar. 3, 1863, ch. 76, § 7, 12 Stat. 737, 740; GOSS, *supra* note 92, at 60. Later, Congress abolished this provision altogether. GOSS, *supra* note 92, at 66. Instead, it provided that, after the commencement of a suit for forfeiture, the government’s attorney could compel production of papers by written motion with the court. Act of June 22, 1874, ch. 391, § 5, 18 Stat. 186, 187; GOSS, *supra* note 92, at 66 (noting that “[t]his entirely took away the great facilities formerly offered for obtaining evidence in the preparation of a suit, and greatly limited the opportunity for procuring evidence during the prosecution of the suit”).

111. GOSS, *supra* note 92, at 34.

112. Act of Apr. 20, 1818, ch. 79, § 9, 3 Stat. 433, 435–36. Later acts created additional appraisers and assistant appraisers in some ports. *See, e.g.*, Act of July 27, 1866, ch. 284, §§ 1–2, 14 Stat. 302, 302; Act of Aug. 30, 1842, ch. 270, § 16, 5 Stat. 548, 563–64; Act of May 28, 1830, ch. 147, §§ 1–2, 4 Stat. 409, 409. In 1830, for example, Congress created a more elaborate scheme for appointing temporary appraisers from the public. *See* Act of May 28, 1830 §§ 1–2, 4 Stat. at 409; GOSS, *supra* note 92, at 42 (noting that where a collector deemed an appraisement too low, he might direct a reappraisement by the principal appraisers to three merchants and, if the importer was dissatisfied, he was to apply to the collector, who would appoint one merchant, who would appoint another; in the case of disagreement, the

were required to “faithfully . . . inspect and examine . . . goods [and] to report . . . the true value thereof when purchased.”<sup>113</sup> Along with a third person—a disinterested resident merchant selected by the importer—they acted as a board of appraisement when the collector determined there were “just grounds to suspect that goods, wares, or merchandise . . . ha[d] been invoiced below the true value.”<sup>114</sup> A further law in 1828 made appraisal mandatory, rather than discretionary, in the case of *ad valorem* taxes.<sup>115</sup>

Judicial control of customs decisions initially occurred through common-law suits against the officers.<sup>116</sup> In 1839, Congress created an administrative appeal from the collector to the Secretary of the Treasury,<sup>117</sup> which the Supreme Court held displaced the old common-law system in *Cary v. Curtis*.<sup>118</sup> The *Cary* decision prompted separate dissents by Justices Story and McLean. Story contended that the Court had unconstitutionally allowed Congress to replace citizens’ “right of action in any court to recover back money claimed illegally . . . by its officers under colour of law” with the Treasury Secretary’s “sole and exclusive authority to withhold or restore that money according to his own notions of justice or right.”<sup>119</sup> In

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two merchants would appoint an umpire). In 1842, Congress provided that where the importer was dissatisfied with the appraisement, the collector would appoint “two discreet and experienced merchants,” who would conduct an appraisal and, if they disagreed, “the collector [should] decide between them.” Act of Aug. 30, 1842 § 17, 5 Stat. at 564. In 1866, a single appraiser was assigned to New York, with ten assistants appointed by the Secretary of the Treasury to act below him. Act of July 27, 1866 §§ 1–2, 14 Stat. at 302.

113. Act of Apr. 20, 1818 § 9, 3 Stat. at 435–36.

114. *Id.* §§ 9, 11, 3 Stat. at 436; see GOSS, *supra* note 92, at 34.

115. Act of May 19, 1828, ch. 55, 4 Stat. 270; GOSS, *supra* note 92, at 40.

116. See GOSS, *supra* note 92, at 54 (noting that “collectors were allowed to retain certain amounts to meet [such] suits”).

117. Act of Mar. 3, 1839, ch. 82, § 2, 5 Stat. 339, 348–49; see GOSS, *supra* note 92, at 54–55.

118. 44 U.S. (3 How.) 236, 252 (1845).

119. *Id.* at 253 (Story, J., dissenting). As Story characterized it, the Court’s interpretation of the statute wrongly permitted “substitution of executive authority and discretion for judicial remedies.” *Id.* at 256. He expressed concern that “if Congress possess a constitutional authority to vest such summary and final power of interpretation in an executive functionary, I know no other subject within the reach of legislation which may not be exclusively confided in the same way to an executive functionary; nay, to the executive himself.” *Id.* at 253. In a separate opinion, Justice McLean reached the same conclusion. See *id.* at 263 (McLean, J., dissenting) (reasoning that the Court’s interpretation of the statute “[i]n a matter of private right . . . takes from the judiciary the power of construing the law, and vests it in the secretary of the Treasury”). The opinions thus presented the difficult line between “public rights” and “private rights,” with which the Supreme Court has struggled. See, e.g., *Stern v. Marshall*, 564 U.S. 462, 489–90 (2011); *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932). Indeed, Story claimed that “[t]he line of discrimination between fabrics and

response to *Cary*, Congress expressly permitted suits against the collector (so long as the importer had exhausted appeal to the Secretary of the Treasury), while providing that the government would pay judgments on the collector's behalf.<sup>120</sup>

Over time, the duties of the appraisers became more "court-like." In 1832, Congress authorized appraisers to summon and examine witnesses to determine the value of imported merchandise and to require the production of letters, accounts, and invoices.<sup>121</sup> In 1851, Congress authorized the President to appoint four general "appraisers of merchandise," who could be assigned to ports as the Secretary of the Treasury saw fit.<sup>122</sup> In the case of an "appeal" from the regular appraisers, a general appraiser, along with a merchant selected by the port collector, would appraise the goods together.<sup>123</sup>

### C. *The Formation and Development of the Board of General Appraisers*

#### 1. The Creation of the Board of General Appraisers

The election in 1888 of a Republican President, Benjamin Harrison, swept Republicans into power in both the House and Senate, giving one party the ability to shape tariff rates and administration along its own policy lines.<sup>124</sup> In April 1890, a certain William McKinley—at that time the Chairman of the Committee on Ways and Means in the House of Representatives, later the twenty-fifth

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articles approaching near to each other in quality, or component materials, or commercial denominations, is . . . sometimes exceedingly obscure . . . [and] therefore . . . fit for judicial inquiry and decision." *Cary*, 44 U.S. (3 How.) at 256. But he had earlier decided that the ascertainment of "all ad valorem duties" by executive branch appraisers could be made "conclusive" in common-law causes of action. *Tappan v. United States*, 23 F. Cas. 690, 691 (C.C.D. Mass. 1822) (No. 13,749); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 580 & n.80 (2007).

120. Act of Feb. 26, 1845, ch. 22, 5 Stat. 727. Initially, Congress repealed the administrative remedy of appeal to the Secretary altogether, but later it reestablished the administrative remedy while keeping the judicial remedy. See Act of Mar. 3, 1857, ch. 98, § 5, 11 Stat. 192, 195.

121. Act of July 14, 1832, ch. 227, § 8, 4 Stat. 583, 592; see GOSS, *supra* note 92, at 45.

122. Act of Mar. 3, 1851, ch. 38, § 3, 9 Stat. 629, 630.

123. *Id.*; see GOSS, *supra* note 92, at 56 (noting that this mechanism introduced a "professional element . . . thus . . . removing [the reappraisal] still further from any influence of the importer").

124. See KAPLAN & RYLEY, *supra* note 88, at 2; see also HARRY J. SIEVERS, BENJAMIN HARRISON: HOOSIER PRESIDENT, THE WHITE HOUSE AND AFTER 3–23, 181 (1968); HARRY J. SIEVERS, BENJAMIN HARRISON: HOOSIER STATESMAN, FROM THE CIVIL WAR TO THE WHITE HOUSE, 1865–1888, at 425–29 (1959).

President of the United States—introduced a tariff bill (“McKinley Tariff Act”), beginning a process that, over decades, “raised duties to their highest levels in U.S. history.”<sup>125</sup> The most notable innovation of the bill, when it came to rates, was the extension of the tariff to agriculture.<sup>126</sup> In terms of administration, a “characteristic feature” of the McKinley Tariff Act was the “increased elaborateness of the classification adopted,” which “greatly increase[d] the difficulty of customs administration.”<sup>127</sup>

At the same time, Congress enacted a companion bill, known as the Customs Administrative Act of June 10, 1890 (“Customs Administrative Act”), which rearranged the organization of the customs service.<sup>128</sup> Under the Customs Administrative Act, which was also introduced by McKinley,<sup>129</sup> all imported goods were to be accompanied by an invoice containing a statement of costs.<sup>130</sup> The goods were then valued by an “appraiser” and, where the duty was *ad valorem* and the valuation by the appraiser exceeded the valuation of the invoice, a double duty would be levied on the difference.<sup>131</sup>

As part of the Customs Administrative Act, Congress established the Board, composed of nine members who would occupy the office of general appraiser of merchandise.<sup>132</sup> Section 12 of the Customs Administrative Act provided that the appraisers “shall be appointed by the President”; that “[n]ot more than five of such general appraisers shall be appointed from the same political party”; and that “[t]hey . . . may be removed from office at any time by the

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125. KAPLAN & RYLEY, *supra* note 88, at 1–2; see ASHLEY, *supra* note 95, at 204; see also LEWIS L. GOULD, THE PRESIDENCY OF WILLIAM MCKINLEY 1 (1980); H. WAYNE MORGAN, WILLIAM MCKINLEY AND HIS AMERICA 96–113 (rev. ed. 2003). McKinley earned his reputation as an ardent protectionist and was reportedly proud of his nickname “The Great Protector.” KAPLAN & RYLEY, *supra* note 88, at 2, 4.

126. ASHLEY, *supra* note 95, at 204.

127. *Id.* at 209–10.

128. *Id.* at 210. McKinley introduced the Customs Administrative Act “not [as] a bill to change the rates of duty; it [was] purely an administrative bill.” 21 CONG. REC. 809 (1890) (statement of Rep. McKinley).

129. U.S. GOV'T PRINTING OFFICE, 60TH CONG., CUSTOMS TARIFFS: SENATE AND HOUSE REPORTS 1888, 1890, 1894, 1897, at 11 (1909).

130. ASHLEY, *supra* note 95, at 210.

131. *Id.* at 211.

132. See Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136. Prior to the creation of the Board, the Treasury Department achieved uniformity in customs administration through the use of “special agents” reporting directly to the Secretary of the Treasury. See Act of May 12, 1870, ch. 102, § 1, 16 Stat. 122, 122–23; GOSS, *supra* note 92, at 64–65.



President for inefficiency, neglect of duty, or malfeasance in office.”<sup>133</sup> The general appraisers were authorized to administer oaths, compel testimony, and produce written materials.<sup>134</sup> The Customs Administrative Act authorized an appeal from a collector to the Board, where a panel of three would examine and decide the case.<sup>135</sup> From the decision of the Board, the collector or the importer could file suit in a circuit court of the United States.<sup>136</sup>

At the outset of the debate, McKinley observed that the creation of the Board was one of “the two leading features of this bill now upon which there may be contention.”<sup>137</sup> His observation proved prescient. There was contention over the Board, in no small part due to the novelty of the administrative apparatus that Congress was considering. As Senator George Gray of Delaware put it, the structure of the Board was “entirely new.”<sup>138</sup> In light of that novelty, as well as the high financial stakes, there followed a spirited debate in both the House and the Senate on the constitutionality of the administrative structure. The debate, however, was not principally over the Customs Administrative Act’s attempted restriction of the President’s removal power—about which there was only a single express reference and two passing allusions.

Instead, objectors to the Customs Administrative Act focused on two related lines of arguments. First, they contended that the Act, by making the facts gathered by the Board final in the appeal to the circuit courts, would deny “to citizens of this country engaged in commerce . . . the constitutional right of a trial by jury.”<sup>139</sup> Second, they contended that the Board was not a “court” exercising

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133. Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136; see GOSS, *supra* note 92, at 81–83; see also *Myers v. United States*, 272 U.S. 52, 269–71, 271 n.51 (1926) (Brandeis, J., dissenting) (discussing how Congress has required political representation to restrict the President’s power to nominate). This article will bracket the question of partisan balance requirements; for recent treatments, see generally Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 COLUM. L. REV. 9 (2018); Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 NOTRE DAME L. REV. 941 (2015).

134. Customs Administrative Act of 1890 § 16, 26 Stat. at 138–39; see GOSS, *supra* note 92, at 83.

135. ASHLEY, *supra* note 95, at 210–11; GOSS, *supra* note 92, at 82.

136. GOSS, *supra* note 92, at 82.

137. 21 CONG. REC. 810 (1890) (statement of Rep. McKinley).

138. *Id.* at 4012 (statement of Sen. Gray); see *id.* (statement of Sen. Allison) (agreeing that the Board was a new apparatus “respecting the mode of the ascertainment of duties” and had “never existed before”).

139. *Id.* at 811–12 (statement of Rep. Breckinridge of Arkansas). Commenting on Representative Breckinridge’s remarks, Representative Blanchard stated that “virtually

“judicial power”—and, hence, its judgments could not be given conclusive effect.<sup>140</sup> This latter argument rested on the premise—articulated by Senator George Vest of Missouri—that the Board was “not a court of law, not a court of general jurisdiction, but it is a limited, *ex parte* revenue tribunal.”<sup>141</sup>

In response to these two charges, McKinley and his allies had two conceptually distinct arguments. First, they claimed that the limitations that the Customs Administrative Act placed on appealing facts to the circuit courts were unproblematic because importers had “all the rights before the board of appraisers that [they]

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den[ying] the right of appeal to the courts from the decision of a collector . . . would be quite a serious matter, and a dangerous innovation on the rights of the citizen.” *Id.* at 813 (statement of Rep. Blanchard); *id.* at 818 (statement of Rep. Breckinridge of Kentucky) (“I have grave doubts whether it is constitutional thus to oust the courts of jurisdiction of the facts in such cases or to wholly deprive a citizen of his right to a trial by jury.”); *id.* at 827 (statement of Rep. Kerr of Iowa) (arguing that the restriction on appeal and trial by jury violated due process); *id.* (statement of Rep. Carlisle) (arguing that the provision was a “substantial delegation of absolute authority to the executive officers of the United States Government to decide for themselves what the tariff laws of this country are, without any appeal to the courts”); *id.* at 844 (statement of Rep. Cummings) (describing the hearings before the Board as “virtually a star chamber proceeding” with “justice in any case depend[ing] entirely upon the uncontrollable decision of a number of men appointed solely for political reasons and acting as partisans in the decision of disputed cases”); *cf. id.* at 4079 (statement of Sen. Evarts) (“The question whether Congress could take away by other modifications the right at common law. . . whether the preservation and full maintenance of the trial by jury would or would not be an essential requisite for the methods that would be treated as maintaining adequate remedies, has never been decided.”).

140. *Id.* at 825 (statement of Rep. Blanchard) (arguing that the Customs Administrative Act “is a piratical craft sailing under deceptive colors” because it restricted “the right of trial by jury and the right of appeal from an inferior court to a superior court”); *id.* at 4017 (statement of Sen. Gray) (“It will deprive importers of valuable rights . . . in relegating them to this imperfect adjudication of their rights by this special tribunal . . . not exercising the ordinary judicial powers which are invoked when a suit at common law is commenced . . .”); *id.* at 4072 (statement of Sen. Gray) (“[T]o preserve the right of trial by jury, to preserve the right by a common-law suit to invoke the judicial power of the land, is essential to preserve these customs laws from being the mere instruments of tyranny in the hands of executive officers.”). In this regard, objectors distinguished between “the ascertainment of the value of the property upon which the tax is to be paid,” which could be determined administratively, and the “matter of classification in rates,” which could be determined only judicially. *Id.* at 4079 (statement of Sen. Call).

141. *Id.* at 4006 (statement of Sen. Vest); *see also id.* (statement of Sen. Vest) (referring to “the loose discretion of boards with *ex parte* jurisdiction” and characterizing the Board as “an *ex parte*, star-chamber, revenue tribunal”). Supporters of the Customs Administrative Act agreed with this premise. *See id.* (statement of Sen. Allison) (agreeing that the Board was “not a court in any sense”); *id.* at 4011 (statement of Sen. Aldrich) (“The ascertainment of value is not in the nature of a judicial determination. It is the case of a board of experts deciding in a summary manner questions of value arising under our tariff laws. We are not erecting a judicial tribunal to hear and determine causes as a court.”); *id.* (statement of Sen. Hiscock) (arguing that it would be “pernicious” to treat “taxing officers . . . substantially as courts or as tribunals to be governed by the rules and proceedings of courts in reference to the discharge of their duties”).

would have in a court.”<sup>142</sup> Second, they claimed that private citizens had no constitutional right to a jury trial or an independent factual judgment by an Article III court in tariff cases. As one supporter of the provision, Representative Sereno Payne of New York, argued, the federal government

was supreme in its power of levying and collecting taxes, and that if they allowed a suit in any case it was only an act of clemency and beneficence on the part of the Government; that they need not allow any claim for redress, but they might make the Secretary of the Treasury the supreme tribunal in the case, both as to the law and as to the facts, and take away entirely the right of trial by jury.<sup>143</sup>

Another supporter—Representative Joseph McKenna, who was later appointed by McKinley to be an Associate Justice of the Supreme Court—contended that critics of the bill erred in believing that the right to challenge tariffs was a “jural right” or a “natural right the citizen possesses,” rather than “a privilege conferred on him by the legislature.”<sup>144</sup>

Precisely what Congress intended to accomplish with the removal restrictions in the Customs Administrative Act is hard to

142. *Id.* at 813 (statement of Rep. McKinley).

143. *Id.* at 818–19 (statement of Rep. Payne); *id.* at 818 (statement of Rep. Payne) (arguing at length, based on Supreme Court precedents, that “laws levying taxes and restricting the common-law right of trial by jury were constitutional”).

144. *Id.* at 828 (statement of Rep. McKenna); *cf. id.* at 830 (statement of Rep. Breckinridge of Kentucky) (disputing that “the Government grants ‘privileges’ to the citizen instead of being itself the repository of the delegated powers granted by the citizen”). It is notable that different congressmen drew different lessons from the history of common-law challenges to customs appraisals. Representative Thomas Bayne, for example, argued that

prior to 1839 common-law actions lay against the collectors of the customs revenue. From 1839 to 1845 the right of action was substantially denied to anybody . . . . In 1845 the common-law right of action was restored. In 1864, a statutory remedy was substituted which opened wide the door for litigation. The particular purpose of the amendment which I propose, as well as the purpose of this entire administrative bill, so far as it related to litigation, is to shut out the great multitude of cases that are brought under the existing law.

*Id.* at 824 (statement of Rep. Bayne). From this history, Bayne contended that the Court’s decision in *Cary v. Curtis*, denying the existence of a common-law remedy, conclusively established that no such remedy was constitutionally required. By contrast, Representative Blanchard contended that, in the wake of *Cary*, “so great was the alarm of the country . . . that Congress . . . forthwith passed an act giving back to the citizen his right of appeal to the courts in such cases and of trial by jury,” which “is the law today and has been so from 1845 down to this time.” *Id.* at 825 (statement of Rep. Blanchard). On this perspective, Congress’s swift repudiation of *Cary* formed the legitimate constitutional baseline. *See id.* at 830 (statement of Rep. Blanchard) (“A majority of the court maintained the act of 1839, but Justice Story dissented, and Congress then in session, enacted the law of 1845 to meet the objections of Justice Story, and to draw the fangs of the act of 1839, which denied to the citizen access to the court to recover his money paid under protest.”).

determine. It appeared to be shared ground among the participants in the debate that the appraisers were executive branch officers, not judges. As Senator Vest put it, “the Government is always represented by a paid officer as an appraiser, put there for that purpose, whose functions belong to the Government, who represents the Government.”<sup>145</sup> Nobody objected to Vest’s claim that the appraisers were, in a very real sense, agents of the executive branch.

At the same time, nobody expressly referred to, or sought to define, the “inefficiency, neglect of duty, or malfeasance in office” language. The sole member of Congress who mentioned the removal provision was Representative Benton McMillin of Tennessee. He argued that the members of the Board “hold their offices for life, which is wrong.”<sup>146</sup> As he put it, the Board members “may be removed by the President for cause; but we all know what that amounts to.”<sup>147</sup> The Board, according to McMillin, “virtually . . . creat[ed] . . . several life offices at \$7,000 a year.”<sup>148</sup> McMillin, in short, clearly was aware of the existence of the removal provision, understood it to be a significant limitation on presidential authority, and believed it to be “wrong.” He did not specify whether the grounds for his objection were constitutional—in other words, that the removal restriction was “wrong” because it was unconstitutional—or merely prudential.

Two further legislative statements illustrate the differing perspectives that legislators had about the Board’s administrative status. On the one hand, Senator Wilkinson Call suggested that there was nothing “extraordinary” about the procedures of the Board because the appraisers would work with “the Secretary of the Treasury supervising.”<sup>149</sup> That statement suggested that the Secretary would supervise the Board. On the other hand, Senator Sherman declared that the Board would be constituted “of men of experience” who were “absolutely independent” and “free from political embarrassments,” but still within the executive branch conducting

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145. *Id.* at 4011 (statement of Sen. Vest); *see id.* at 4072 (statement of Sen. Gray) (characterizing appraisers as “executive officers”); *id.* at 4074 (statement of Sen. Call) (referring to the “discretionary power committed to executive officers”).

146. *Id.* at 5341 (statement of Rep. McMillin).

147. *Id.* (statement of Rep. McMillin).

148. *Id.* (statement of Rep. McMillin).

149. *Id.* at 4081 (statement of Sen. Call). Senator Call’s remarks mirrored those he made during the debate over the Interstate Commerce Commission. *See* 18 CONG. REC. 570 (1887) (statement of Sen. Call).

“an administrative, not a judicial, proceeding.”<sup>150</sup> That suggested the Board would be “independent” in some fashion.

Nevertheless, despite the general silence of the congressional record, some informed speculation is possible: the authors and the supporters of the Customs Administrative Act were well aware that its provisions failed to give those who challenged customs determinations a jury trial managed by an Article III judge who was subject to the Constitution’s tenure and salary protections. For that reason, they sought to replace the constitutional protections of jury trial and judicial determination with a reduced form of “independence”—namely, tenure protection under the “inefficiency, neglect of duty, or malfeasance in office” standard. As Representative Thomas Bayne, a Republican from Pennsylvania, reasoned,

although the right of trial by jury as to questions of fact is taken away, there is a substitute for the jury in the nine appraisers, skilled in their work, having full knowledge of their business, having full and direct information of the facts, and their finding will be far safer and more in accord with the justice of the case than the verdict of a petit jury is likely to be.<sup>151</sup>

In a similar vein, Senator Sherman claimed that the Customs Administrative Act “provide[d] a substitute for the common-law remedy” by creating “impartial tribunals to ascertain facts,” composed of members whose “judgment . . . upon a question of fact is worth more than the judgment of fifty jurors or fifty juries.”<sup>152</sup> “Here is an impartial verdict,” Sherman continued, “of three skilled and competent men trained in the business, and how much better that would be than a jury picked up in New York . . . .”<sup>153</sup> “Independ-

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150. 21 CONG. REC. 4116 (1890) (statement of Sen. Sherman).

151. *Id.* at 825 (statement of Rep. Bayne). Bayne expressly tied the bill to the large number of pending cases. *See id.* (statement of Rep. Bayne).

152. *Id.* at 4021 (statement of Sen. Sherman); *see also id.* at 4075 (statement of Sen. McPherson) (“Of all the cases that may go before a jury here is a case which the Senator knows the jury in ninety-nine cases out of one hundred are incompetent to deal with intelligently or beneficially either to the Government or to the claimant. Therefore it was that we proposed first to have the appraisalment made by a board of experts.”). Senator Sherman, of course, was the prime mover behind the famous Sherman Act, which Congress also passed in 1890. *See Act of July 2, 1890, ch. 647, 26 Stat. 209.*

153. 21 CONG. REC. 4021 (1890) (statement of Sen. Sherman). Sherman remarked that, if he had his way, he would “organize a special court” and that “the result will be in the end that we shall have a customs court.” *Id.* (statement of Sen. Sherman). Sherman’s prediction was to come true, but not for another sixty-six years. *See infra* notes 306–07 and accompanying text.

ence” from the President, on this logic, would take the place of the petit jury.<sup>154</sup>

President Harrison appointed nine appraisers, among them Thaddeus S. Sharretts and Ferdinand N. Shurtleff.<sup>155</sup> Both of them would be removed by future Presidents.<sup>156</sup>

## 2. The *Shurtleff* Controversy

The McKinley Tariff Act prompted “an immediate and violent reaction,” which likely played a role in the Republicans’ mammoth congressional losses in the 1890 midterm elections and in the presidential election of Grover Cleveland after a one-term hiatus in 1892.<sup>157</sup> It was followed in 1894 by a partial reduction in the tariff (known as the “Wilson tariff”) and, after McKinley’s election as President, in 1897 by an increase in the tariff (known as the “Dingley tariff”).<sup>158</sup> The latter act, “[f]rom the administrative point

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154. For an account of the Board suggesting that the constitutional concerns expressed in the 1890 debate did not materialize, see FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 148–52 (1928) (contending that despite the “expectation that the newly created Board of General Appraisers would largely divert from the courts litigation over tariff clauses,” “the court proceedings turned into trials *de novo* and not reviews of the findings of the Board of Appraisers” because of “the introduction of new evidence before the circuit courts”). Interestingly, Congress also appeared unsure whether it could “confer the power upon these executive officers [*i.e.*, the Board] to summon witnesses and compel their attendance as a matter of law.” 21 CONG. REC. 4016 (1890) (statement of Sen. Allison) (noting that the issue “was discussed by the committee at great length a good many times, [which] finally decided that [it] had not that power”); *id.* (statement of Sen. Vest) (noting that “very eminent courts have decided [this issue] both ways”); *cf. In re Pacific Ry. Comm’n*, 32 F. 241, 267–68 (C.C. N.D. Cal. 1887) (holding that an agency, not being a judicial body, lacks the power to compel production of evidence).

155. 27 JOURNAL OF THE EXECUTIVE PROCEEDINGS OF THE SENATE OF THE UNITED STATES OF AMERICA 705, 718 (1890).

156. *President Asks Appraisers to Resign*, CHI. DAILY TRIB., Jan. 24, 1899, at 1; *Webb Resolution Tabled: The Importers’ Side of the Story; Appraisers Sharretts and Robinson Removed by Taft*, CROCKERY & GLASS J., Mar. 6, 1913, at 13 [hereinafter *Webb Resolution Tabled*]. The volume of cases decided by the Board appears to have been high. See GOSS, *supra* note 92, at 83 (“During the first three months after their [sic] appointment, the general appraisers decided 779 cases of appeals on questions of value, 713 of which were in New York.”).

157. ASHLEY, *supra* note 95, at 213; KAPLAN & RYLEY, *supra* note 88, at 4; see DOBSON, *supra* note 18, at 19. Other issues likely played a role as well. See KAPLAN & RYLEY, *supra* note 88, at 5.

158. KAPLAN & RYLEY, *supra* note 88, at 5, 8–10; see ASHLEY, *supra* note 95, at 213–23. The tariffs were named after their chief sponsors in the House of Representatives, respectively William Wilson of West Virginia and Nelson Dingley, Jr., of Maine. KAPLAN & RYLEY, *supra* note 88, at 5, 9. The Wilson tariff notably also imposed a tax of two percent on incomes over \$4000, which the Supreme Court declared unconstitutional in *Pollock v. Farmers’ Loan & Tr. Co.*, 158 U.S. 601, 637 (1895). KAPLAN & RYLEY, *supra* note 88, at 8.

of view . . . was even more complicated than its predecessors.”<sup>159</sup> Nevertheless, Congress did not significantly alter it for twelve years, focusing its attention on other political and economic issues.<sup>160</sup>

In the interim, President McKinley removed Ferdinand Shurtleff from his office as a member of the Board on May 3, 1899, though the process began a few months earlier in January 1899.<sup>161</sup> The demand for Shurtleff’s resignation appeared to stem from two factors: disputes about proper application of the tariff statutes and the Board’s unusual place in the Treasury Department’s administrative structure. A letter dated January 6, 1899, from the President of the Board of General Appraisers, George Tichenor, to Garret Hobart, McKinley’s Vice President until his death later in 1899, illustrated the first factor.<sup>162</sup> Tichenor’s letter conveyed his “earnest suggestion that [the President] select the very best man possible to . . . assur[e] to the public that in the contemplated reorganization of the Board . . . a radical improvement in the Personnel is contemplated”; to “strengthen[] the Board both in capacity and reputation”; and “[to] discourage weak, incompetent and improper persons from seeking and being recommended for appointment to the Board.”<sup>163</sup> In this regard, Tichenor remarked that “President [Benjamin] Harrison was most unfortunate in selection [of] so many members who were markedly lacking” in the necessary “qualities and requirements.”<sup>164</sup> But while these aspects of Tichenor’s letter sounded in straightforward themes of good governance, other parts of the letter indicated the existence of fundamental policy disputes. As Tichenor put it, “[n]ot more than three of the nine members selected by” Harrison were “protectionists or

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159. ASHLEY, *supra* note 95, at 221.

160. *Id.* at 230.

161. *Shurtleff v. United States*, 189 U.S. 311, 312 (1903); Transcript of Record at 1–2, *Shurtleff*, 189 U.S. 311 (No. 620).

162. Letter from George C. Tichenor, President of the Bd. of Gen. Appraisers, to Garret Hobart, Vice President of the U.S. (Jan. 6, 1899), *microformed on* William McKinley Papers, reel 5 (Library of Cong.).

163. *Id.* (emphasis omitted).

164. *Id.* Tichenor’s letter to Hobart did not mention Shurtleff expressly, but rather was prompted by the anticipated resignation of George Sharpe, whom Tichenor described in scathing terms. *See id.* (“It would be a weak man indeed who would not be an improvement upon General Sharpe in point of efficiency . . . [His] tenure should not be dependent upon the selection of his successor, but should terminate at once, as his services are of but little consequence.”); *see also* Letter from George M. Sharpe, Member of the Bd. of Gen. Appraisers, to William McKinley, President of the U.S. (Jan. 18, 1899), *microformed on* William McKinley Papers, reel 5 (Library of Cong.) (tendering resignation from the Board).

in sympathy with the real purposes of the Customs Administrative Act and of the tariff system and policy which the Administrative Act was intended to safe guard.”<sup>165</sup> The “remaining members,” according to Tichenor, were “either free traders, so-called revenue reformers, or worse than all men without conviction.”<sup>166</sup> McKinley’s appointment, by contrast, should be “above all a protectionist of mature conviction and in full sympathy with our tariff system.”<sup>167</sup>

The second possible rationale for Shurtleff’s removal—the Board’s unusual place in the Treasury Department’s administrative structure—was hinted at in newspaper reports that followed the January 17, 1899, letter that McKinley’s Secretary of the Treasury, Lyman Gage, sent to Shurtleff requesting his resignation.<sup>168</sup> One news report identified “friction between the Appraisers and the Treasury department,” because Board members “contend[ed] they were not responsible to the Secretary of the Treasury.”<sup>169</sup> In this regard, the Secretary of the Treasury had enacted regulations in 1897 “materially curtailing the powers of the Appraisers and brushing away the contention that they possessed judicial functions”—thereby “widen[ing]” the “breach” between the two bodies.<sup>170</sup>

Shurtleff’s reaction to the request for his resignation was “surprise.”<sup>171</sup> As he put it, he had “always thought that the tenure of office of the general appraiser was for life,” that his “efficiency” had not been “questioned,” and that no charges could be brought “[a]s to neglect of duty or malfeasance in office.”<sup>172</sup>

Notwithstanding this complex backdrop, when McKinley finally removed Shurtleff, his letter was short and to the point: “You are

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165. Letter from George C. Tichenor, President of the Bd. of Gen. Appraisers, to Garret Hobart, Vice President of the U.S. (Jan. 6, 1899), *microformed on William McKinley Papers*, reel 5 (Library of Cong.).

166. *Id.*

167. *Id.* Tichenor claimed that, because of these deficiencies in the Board’s personnel, his “health ha[d] been destroyed in almost super-human efforts to save the Administrative Act from public condemnation, notwithstanding the fact that it [was] the very best system of Customs administration ever devised in any country.” *Id.*

168. *President Asks Appraisers to Resign*, *supra* note 156, at 1. In addition to Shurtleff, McKinley asked for the resignation of a second member of the Board, Joseph Biddle Wilkinson. *See id.*

169. *Id.*

170. *Id.*

171. *Mr. Shurtleff Surprised*, WASH. POST, Jan. 25, 1899, at 9.

172. *Id.*



hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor.”<sup>173</sup> Most pertinently, the letter did not specify any reasons for Shurtleff’s removal. Nine days later (on May 12, 1899), McKinley made a recess appointment to fill Shurtleff’s position and on May 15, 1899, Shurtleff stopped receiving his salary from the Treasury Department.<sup>174</sup> The Senate later confirmed Shurtleff’s replacement on January 17, 1900.<sup>175</sup>

McKinley’s removal of Shurtleff was something of a cause célèbre in financial circles. According to an article in the *New York Times*, it “was reported that Mr. Shurtleff had secured the services of ex-President Benjamin Harrison as counsel” for a potential lawsuit seeking backpay.<sup>176</sup> While that rumor turned out to be untrue, Shurtleff was ultimately able to retain John G. Carlisle, a former Secretary of the Treasury.<sup>177</sup> The political salience of the lawsuit was further demonstrated by reports suggesting that a “number of importers in New York ha[d] interested themselves” in it, “collected funds for defraying [Shurtleff’s] expenses,”<sup>178</sup> and adopted resolutions “protesting against President McKinley’s action in summarily removing Mr. Shurtleff.”<sup>179</sup>

Shurtleff sued to recover his salary in the Court of Claims, which rejected his argument.<sup>180</sup> He then sought review in the Supreme Court, which also rejected his argument.<sup>181</sup> The Supreme Court reasoned that Congress’s enumeration of the bases on which the President could remove a general appraiser—“inefficiency, neglect of duty, or malfeasance in office”—did not exhaust the possible grounds for the President’s exercise of his removal authority.<sup>182</sup>

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173. *Shurtleff v. United States*, 189 U.S. 311, 312 (1903).

174. *Id.* at 312–13; see *Israel F. Fischer Sworn In*, N.Y. TIMES, May 16, 1899, at 12.

175. *Shurtleff*, 189 U.S. at 313.

176. *He May Retain Gen. Harrison*, N.Y. TIMES, Mar. 10, 1899, at 5.

177. *Mr. Shurtleff May Contest*, N.Y. TIMES, May 26, 1899, at 2; *Mr. Shurtleff to Sue the Government*, N.Y. TIMES, June 21, 1899, at 5.

178. *Mr. Shurtleff to Sue the Government*, *supra* note 177, at 2.

179. *Mr. Shurtleff May Contest*, *supra* note 177, at 2.

180. *Shurtleff*, 189 U.S. at 311; see *Mr. Shurtleff Brings Suit*, N.Y. TIMES, June 28, 1899, at 14.

181. *Shurtleff*, 189 U.S. at 318–19. Justice Joseph McKenna was a member of the *Shurtleff* Court, having previously played a role as a Representative in the 1890 congressional debate over the creation of the Board. See *id.* at 313; 21 CONG. REC. 833 (1890) (statement of Rep. McKenna).

182. *Id.* at 313, 319; see also *id.* at 317 (rejecting as “mistaken” the proposition that “the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official

The background rule, according to the Court, was that, “in the absence of constitutional or statutory provision the President can by virtue of his general power of appointment remove an officer.”<sup>183</sup> It would take “very clear and explicit language,” rather than “mere inference or implications,” to displace this background rule.<sup>184</sup> Section 12 of the Customs Administrative Act, the Court concluded, did not contain such a clear statement.<sup>185</sup> Moreover, the Court noted, if Section 12 were interpreted to contain an exclusive list of bases for removal, the consequences would be dramatic, for it would “give an appraiser of merchandise the right to hold that office during his life or until he shall be found guilty of some act specified in the statute.”<sup>186</sup> That would accomplish “a complete revolution in the general tenure of office”—an “extraordinary change” that the Court believed could not be attributed to Congress.<sup>187</sup>

Thus, where the President elected to remove an officer for a cause not specified by statute, he could do so for any reason and in any manner that he chose.<sup>188</sup> The statute simply required that the officer be given notice and a hearing when the President invoked one of the three enumerated grounds.<sup>189</sup>

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responsibility, should think sufficient”).

183. *Id.* at 314–15; see *Parsons v. United States*, 167 U.S. 324, 343 (1897); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

184. *Shurtleff*, 189 U.S. at 315; see, e.g., *Blake v. United States*, 103 U.S. 227, 236 (1880). The *Shurtleff* Court drew a distinction between inferior officers appointed by principal officers and those who had been appointed by the President. *Shurtleff*, 189 U.S. at 315. In *Shurtleff*, the Court said: “Congress has regarded the office as of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President . . .” *Id.*

185. *Shurtleff*, 189 U.S. at 315–16 (rejecting application of the “*expressio unius est exclusio alterius*” canon and the argument that “the President was . . . prohibited from any removal excepting for the causes, or some of them” enumerated in the statute).

186. *Id.* at 316.

187. *Id.* (reasoning that the contrary interpretation “would involve the alteration of the universal practice of the government for over a century and the consequent curtailment of the powers of the executive in such an unusual manner”).

188. *Id.* at 318–19. The Court assumed

for the purposes of this case only, that Congress could attach such conditions to the removal of an officer appointed under this statute as to it might seem proper, and, therefore, that it could provide that the officer should only be removed for the causes stated and for no other, and after notice and an opportunity for a hearing.

*Id.* at 314. As discussed immediately below, Congress took the invitation to change the statute five years later. See *infra* Part I.C.3.

189. *Shurtleff*, 189 U.S. at 314, 317 (“[I]f a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his

### 3. Congress's Amendment to the Removal Restriction

Five years after the decision in *Shurtleff*, Congress amended the Customs Administrative Act with the Act of May 27, 1908 ("1908 Act") to provide "[t]hat all of the general appraisers of merchandise heretofore or hereafter appointed . . . [could] after due hearing, be removed by the President for the following causes, *and no other*: Neglect of duty, malfeasance in office, or inefficiency."<sup>190</sup> The addition of the "and no other" language was clearly targeted at the Court's interpretation of the removal restriction in *Shurtleff*.

When the provision was debated in Congress, Representative Sereno Payne—the bill's principal sponsor—clarified that this provision was intended to make "it impossible to remove an appraiser except upon charges and an opportunity to be heard."<sup>191</sup> According to Payne:

It was realized in the very beginning, at the passage of this law, that in order to insure efficiency by this Board the members of it should not be subject to removal at the mere whim or caprice of the President or anybody else. They are appointed from both political parties, a certain number from one party, and they should hold office during good behavior [sic]. This is what was intended to be provided for in the law as it now exists, that the President should not remove them except upon charges and for cause, but the President did remove one several years ago and it went to the Supreme Court and the Supreme Court decided that the President could remove them at pleasure. Now, this bill provides, if I can turn my eye to the particular paragraph, that they can only be removed by the President, not for political reasons, but after due inquiry, for reasons of neglect of duty, incompetency, or malfeasance in office. It is very important, the Government being one of the litigants on one side, that these men should be kept entirely independent of the Administration so that they may be able to perform their duties fearlessly and honestly.<sup>192</sup>

On further questioning by Representative John Gaines of Tennessee, Payne declared that the appraisers were "put in the same

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removal cannot be regarded as the least imputation on his character for integrity or capacity."); *see also* *Reagan v. United States*, 182 U.S. 419, 425 (1901) (holding that, if a statute specifies causes for removal, "then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential"). *Shurtleff* also relied on a series of state cases to establish this proposition. *See Shurtleff*, 189 U.S. at 314.

190. Act of May 27, 1908, Pub. L. No. 60-146, sec. 3, § 31, 35 Stat. 403, 406 (emphasis added).

191. 42 CONG. REC. 5036 (1908) (statement of Rep. Payne).

192. *Id.* (statement of Rep. Payne).

category as the judges who have these questions to determine.”<sup>193</sup> He also claimed that the kind of hearing was “for the President to decide,” so long as it was “a hearing upon inquiry and with opportunity for them to be heard.”<sup>194</sup> In a similar vein, in response to questions from Senator Augustus Bacon of Georgia, the bill’s chief Senate sponsor, Senator Nelson Aldrich of Rhode Island, argued that the statute rendered an appraiser a holder of office “during good behavior, but he is removable for certain causes”—a state of affairs that had “not been the case heretofore” because “[t]hese officers ha[d] been removable at the pleasure of the President for political or other reasons.”<sup>195</sup>

The 1908 Act also included a number of provisions making the Board more “court-like.” Most pertinently, the 1908 Act required challengers to exhaust their evidence with the Board before taking an appeal to federal court.<sup>196</sup> In addition, it provided that the

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193. *Id.* (statement of Rep. Payne).

194. *Id.* (statement of Rep. Payne). The accompanying House Report expressed the same basic logic:

[The bill] fixes the tenure of office of the general appraisers by providing for removal only for cause and after due inquiry. The original law was intended to provide just this; but it has since been held by the Supreme Court that a general appraiser may be removed at the will of the President. It is urged by the importers that this takes away, to a certain extent, the independence of the general appraisers and tends to make them subservient to one of the parties litigant before them, to wit, the United States.

This amendment is recommended for the influence it may have in constituting this tribunal as it was intended to be, an entirely independent tribunal, not removable for political reasons or, in fact, for any reasons save those mentioned and then only after due inquiry.

The peculiar nature of the duties of the general appraisers is such that the more expert they become in the examination and passing upon the questions brought before them the more serviceable they are in the administration of the law.

It may also be said that, after abandoning their professions or life work to engage in the service of a general appraiser, they soon become unfitted to undertake any other occupation, and if removed for political reasons, are thrown out at a time of life when it is difficult to engage in anything which will be profitable or lucrative.

H.R. REP. NO. 60-1450, at 5 (1908).

195. 42 CONG. REC. 6188–89 (1908) (statement of Sen. Aldrich).

196. Act of May 27, 1908, Pub. L. No. 60-146, sec. 2, § 15, 35 Stat. 403, 404; 42 CONG. REC. 6915 (1908) (statements of Rep. Payne and Rep. Underwood); 42 CONG. REC. 5036 (1908) (statement of Rep. Payne) (“The custom now is, I might say, almost general for the importer to call a single witness, not to make out his case, and leave the general appraisers to decide against him, and then take the appeal to the circuit court, where the case may be heard on new evidence.”); 42 CONG. REC. 5036 (1908) (statement of Rep. Underwood) (“[I]f the importer did not wish to risk his case and merely wanted to develop the Government’s side of the case, he allowed the Government to develop its evidence, closed the case, and took an appeal to the district court of the United States, where the question was open de

Board's decision "as to the rate and amount of duties chargeable upon imported merchandise . . . and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive upon all persons interested" unless the decision was appealed to the circuit court.<sup>197</sup> The 1908 Act also granted the Board of nine general appraisers the power to establish "such reasonable rules of practice . . . as may be deemed necessary for the conduct of their proceedings."<sup>198</sup> Finally, the 1908 Act gave the Board "all the powers of a circuit court of the United States in preserving order, compelling the attendance of witnesses, and the production of evidence, and in punishing for contempt."<sup>199</sup>

The effect of the 1908 Act was to negate the construction that *Shurtleff* had given to the provision restricting the President's removal authority. If a President wanted to remove a member of the Board after 1908, he would have to satisfy the 1908 Act's protections—or argue that they were unconstitutional. In the background of this debate was a certain Senator George Sutherland. Although he appears not to have played a role in the debate, he later wrote the Court's opinion in *Humphrey's Executor*, which distinguished the Court's earlier opinion in *Shurtleff*.<sup>200</sup>

## II. THE EVENTS OF 1912 AND 1913

Between the Civil War and Taft's presidency, the Republican Party had supported a high tariff to protect American industry, which had led to the association of high tariffs with big business (and, to be sure, the workers of those businesses).<sup>201</sup> Opponents believed the tariff was little more than a subsidy for big business—"the mother of the trusts"<sup>202</sup>—that led to a higher cost of living for the general population.<sup>203</sup> The Dingley tariff ("Dingley Bill of

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novo, and he had a chance to develop his case entirely again . . .").

197. Act of May 27, 1908 sec. 1, § 14, 35 Stat. at 403–04.

198. *Id.* sec. 1, § 14, 35 Stat. at 404.

199. *Id.* sec. 3, § 31, 35 Stat. at 406.

200. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618, 621–23 (1935).

201. See KAPLAN & RYLEY, *supra* note 88, at 1.

202. See CHARLES A. BEARD, *CONTEMPORARY AMERICAN HISTORY, 1877–1913*, at 112–13 (1914) ("[T]he favorite [Democratic] party slogan [was] that 'the tariff is the mother of the trusts.'").

203. *Id.* at 1; see ASHLEY, *supra* note 95, at 237; KAPLAN & RYLEY, *supra* note 88, at 4; JOANNE REITANO, *THE TARIFF QUESTION IN THE GILDED AGE 74* (1994) (noting that Republicans used the tariff to concentrate wealth in big businesses, giving a trickle-down effect to big business's employees); *Always Arrayed Against Business. Whenever the Free-Trade Party*

1897”) had raised the tariff to an all-time high.<sup>204</sup> As for tariff administration, the enactment of the Customs Administrative Act’s tariff provisions made the Board a major component. When Taft came to power, the stage was set for major changes.

#### A. *Taft and Frankfurter Go to Washington*

Taft ascended to the White House with one of the most glittering resumes imaginable. He had been a judge on the Sixth Circuit Court of Appeals, the first Governor-General of the Philippines, and the Secretary of War under President Theodore Roosevelt.<sup>205</sup> Among his tasks in the latter capacity was the building of the Panama Canal—no small legal, diplomatic, or technical achievement.<sup>206</sup> Both the tariff and presidential control of the executive branch played important roles in Taft’s presidency.

Although a Republican—and nowadays, generally associated with the party’s relatively conservative wing, which tended toward protectionism—Taft was on record as desiring a downward revision of the tariff under the Dingley Bill of 1897.<sup>207</sup> The tariff had played an important role in Taft’s election.<sup>208</sup> The Democratic Party “pronounced in favour of an effective and extensive reduction of the rates of duty.”<sup>209</sup> The Republicans also sought tariff revision, but were splintered—with one faction in favor of real reduction in the protective rates, while another and more powerful faction sought “a revision of the tariff by its friends.”<sup>210</sup> During the 1908 presidential campaign, Taft had expressed the view that “a revision of the tariff in accordance with the pledge of the Republican platform will be, on the whole, a substantial revision downward.”<sup>211</sup>

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*Has Been in Power American Business Has Suffered.*, 55 AM. ECONOMIST 176, 176 (1915) (linking the protective tariff of the Republican Party to the protection of big business).

204. KAPLAN & RYLEY, *supra* note 88, at 11–12.

205. DONALD F. ANDERSON, *supra* note 10, at 6–7, 11–12.

206. *Id.* at 17–18.

207. KAPLAN & RYLEY, *supra* note 88, at 39.

208. ASHLEY, *supra* note 95, at 237.

209. *Id.*

210. *Id.* at 238; see G.M. Fisk, *The Payne-Aldrich Tariff*, 25 POL. SCI. Q. 35, 37 (1910); F.W. Taussig, *The Tariff Debate of 1909 and the New Tariff Act*, 24 Q.J. ECON. 1, 17 (1909); H. Parker Willis, *The Tariff of 1909*, 17 J. POL. ECON. 589, 589 (1909).

211. Fisk, *supra* note 210, at 38–39 (quoting President Taft from his campaign speech in Milwaukee on September 24, 1908); see JUDITH ICKE ANDERSON, WILLIAM HOWARD TAFT: AN INTIMATE HISTORY 170 (1981) (“Taft had pledged himself squarely to a revision that

The tariff thus became one of the major political issues of Taft's presidency. Upon election, Taft called a special congressional session to consider the tariff.<sup>212</sup> But he did not specify what he expected from a tariff bill—not even by announcing whether he expected rate reductions—leaving those details to be hashed out in Congress.<sup>213</sup> A bill proposed by Congressman Sereno Payne passed the House, enlarging a list of commodities that could enter the country duty free and cutting duties on certain other products.<sup>214</sup> In the Senate, however, old-guard Republicans led by Aldrich sought to revise the rates upward.<sup>215</sup> The final bill (“Payne-Aldrich Bill”), which Taft signed, did not amount to a dramatic downward revision of rates.<sup>216</sup> Indeed, it increased some duties.<sup>217</sup>

The congressional election of 1910—in which the Republicans lost their large majority—was widely attributed to Taft's handling of the tariff issue.<sup>218</sup> Many moderate Republicans were dissatisfied with the tariff bill because they sought a true downward revision of duties.<sup>219</sup> The Democrats, having taken the House in the election of 1910, quickly enacted bills to reduce substantially the duties on certain goods, some of which passed the Senate with modifications—only to be vetoed by Taft.<sup>220</sup>

Taft's removal of subordinates also played an important role in his presidency. Taft may have been “skeptical” of some aspects of

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would benefit the consumer.” (quoting *Tariff Put Up to Taft*, WASH. POST, Apr. 28, 1909, at 6). For a treatment of the Payne-Aldrich Tariff Bill, see JUDITH ICKE ANDERSON, *supra*, at 169–79. For a suggestion that the Republican platform was not as anti-tariff as Taft's statement, see DONALD F. ANDERSON, *supra* note 10, at 38, 52 (noting that “Taft pushed more aggressively than Roosevelt for downward revision, and during his campaign he pledged to call a special session of Congress to dispose of the issue”).

212. 44 CONG. REC. 49 (1909); KAPLAN & RYLEY, *supra* note 88, at 40. The message, however, studiously avoided referring to a downward revision of rates. KAPLAN & RYLEY, *supra* note 88, at 40.

213. KAPLAN & RYLEY, *supra* note 88, at 40.

214. *Id.*

215. *Id.* at 41. The machinations in the Senate formed the basis for the modern income and corporate taxes. With Taft's support, Senator William Borah, a progressive Republican from Idaho, introduced an income tax amendment to the Payne-Aldrich Bill, notwithstanding the Supreme Court's earlier determination in *Pollock v. Farmers' Loan & Trust Co.* that the tax was unconstitutional. *Id.* at 42. Although the income tax was not a part of the final bill, Aldrich agreed to a tax on corporations and agreed to permit the states to vote on an income tax amendment to the Constitution. *Id.*

216. See ASHLEY, *supra* note 95, at 243, 252. Taft had, by and large, refrained from any direct intervention in negotiations until the conference of the two bills. *Id.* at 243.

217. See *id.* at 240, 242, 244–46.

218. KAPLAN & RYLEY, *supra* note 88, at 43–44.

219. See ASHLEY, *supra* note 95, at 250.

220. *Id.* at 253.

the robust vision of executive authority advanced by his predecessor, Theodore Roosevelt,<sup>221</sup> but presidential authority to remove subordinates was not one of them. In 1910, his removal of the federal Chief Forester, Gifford Pinchot, caused a rupture with Roosevelt.<sup>222</sup> The disagreement between the two prompted Roosevelt's candidacy as a "Bull Moose" in the 1912 election, which split the Republican vote and contributed to Taft's defeat and Woodrow Wilson's victory in the campaign for the Presidency.<sup>223</sup>

Frankfurter, on the other hand, had followed his mentor, Henry Stimson, to Washington. Taft appointed Stimson, a former United States Attorney for the Southern District of New York, Secretary of War in 1910, and Stimson, in turn, appointed his former aide, Felix Frankfurter, as the law officer of the Bureau of Insular Affairs.<sup>224</sup> A twenty-eight-year-old at the time of his appointment in 1911, Frankfurter served as a personal assistant to Stimson, helping with speeches, sitting in on department conferences, and offering advice.<sup>225</sup>

#### B. *Taft's Decision to Remove*

There were a variety of issues to occupy Taft's mind in the final days of 1912—what were to be the final days of his presidency. For example, in August 1912, Congress passed the Panama Canal Act, providing for the administration of the canal zone and authorizing the President to fix, within limits, the tolls to be paid by vessels using the canal.<sup>226</sup> Nevertheless, Taft spent an inordinate amount of effort on the removal of two general appraisers.

On August 21, 1912, Taft wrote Chandler Anderson (the Counselor for the State Department), Winfred Denison (an Assistant Attorney General in the Department of Justice), and William Loeb, Jr., (the Collector of Customs for the Port of New York), appointing

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221. See, e.g., STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 173 (1982).

222. See CHACE, *supra* note 1, at 14.

223. See *id.* at 14–19, 117, 209.

224. BAKER, *supra* note 10, at 13–15, 30.

225. *Id.* at 30.

226. ASHLEY, *supra* note 95, at 256.



them to “a committee of inquiry to investigate the practice, procedure and administrative methods of the Board.”<sup>227</sup> The letters instructed them to “conduct [the] investigation with the view to obtaining increased efficiency and greater economy in the expenditure of public money . . . and . . . obtaining better administrative methods” for the Board.<sup>228</sup> It also directed them to report whether “there has been, within the meaning of the . . . Statute, any neglect of duty, malfeasance in office, or inefficiency on the part of any members of the said Board.”<sup>229</sup>

Newspapers carried the Treasury Department’s announcement of the initiation of an investigation. One report described the investigation as the “result of complaints that the work of the board does not give satisfactory results as a portion of the governmental mechanism of collecting revenues from customs.”<sup>230</sup> On August 27, 1912, one of the Board’s members—Thaddeus Sharretts—fired a volley in the other direction by issuing a counter-statement to the press. According to him, the Board “had a very different idea of its function” than the Treasury Department’s statement would have suggested.<sup>231</sup> For one thing, Sharretts believed, the Board “received the powers of a court by act of Congress,” with “the same authority as any other Federal tribunal to subpoena witnesses and to punish for contempt.”<sup>232</sup> In doing so, according to Sharretts, the

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227. Taft sent three separate letters, identical in material respects, to the anticipated members of the Committee. Letter from William H. Taft, President of the U.S., to Winfred T. Denison, Assistant Attorney Gen. of the U.S., U.S. Dep’t of Justice (Aug. 21, 1912), *microformed on* William H. Taft Papers, reel 513 (Library of Cong.) [hereinafter Taft Papers]; Letter from William H. Taft, President of the U.S., to William Loeb, Jr., Collector of Customs, Port of N.Y. (Aug. 21, 1912), *microformed on* Taft Papers, reel 513; Letter from William H. Taft, President of the U.S., to Chandler P. Anderson, Counselor for the U.S. State Dep’t (Aug. 21, 1912), *microformed on* Taft Papers, reel 513.

228. Letter from William H. Taft, President of the U.S., to Winfred T. Denison, Assistant Attorney Gen. of the U.S., U.S. Dep’t of Justice (Aug. 21, 1912), *microformed on* Taft Papers, reel 513; Letter from William H. Taft, President of the U.S., to William Loeb, Jr., Collector of Customs, Port of N.Y. (Aug. 21, 1912), *microformed on* Taft Papers, reel 513; Letter from William H. Taft, President of the U.S., to Chandler P. Anderson, Counselor for the U.S. State Dep’t (Aug. 21, 1912), *microformed on* Taft Papers, reel 513.

229. Letter from William H. Taft, President of the U.S., to Winfred T. Denison, Assistant Attorney Gen. of the U.S., U.S. Dep’t of Justice (Aug. 21, 1912), *microformed on* Taft Papers, reel 513; Letter from William H. Taft, President of the U.S., to William Loeb, Jr., Collector of Customs, Port of N.Y. (Aug. 21, 1912), *microformed on* Taft Papers, reel 513; Letter from William H. Taft, President of the U.S., to Chandler P. Anderson, Counselor for the U.S. State Dep’t (Aug. 21, 1912), *microformed on* Taft Papers, reel 513.

230. *Customs Appraisers to Be Investigated*, N.Y. TIMES, Aug. 22, 1912, at 18.

231. *Appraisers Resent Being Investigated*, N.Y. TIMES, Aug. 27, 1912, at 12.

232. *Id.*

appraisers “act as Judges” with “judicial powers” by “tak[ing] testimony and render[ing] decisions in accordance with the evidence before them.”<sup>233</sup> For another, the Board’s function, Sharretts contended, “[was] to do justice between importers and the customs.”<sup>234</sup> The Board was not a part of the “mechanism of collecting revenue,” because there were “two dissatisfied parties every time the board overthrew a customs ruling and admitted an imported article at a lower rate of duty”—the Treasury Department and the American manufacturer of competing goods.<sup>235</sup>

“So far as an investigation goes,” Sharretts confidently predicted, “I am sure that I have been guilty of no malfeasance in office or inefficiency.”<sup>236</sup>

On September 30, 1912, Anderson withdrew due to the pressure of his obligations as Counselor for the Department of State.<sup>237</sup> Anderson’s departure made space for the then-comparatively-obscure Frankfurter, who was appointed to replace him.<sup>238</sup> Together, Denison, Loeb, and Frankfurter constituted the President’s “committee of inquiry” (“Committee”).<sup>239</sup>

While the Committee conducted its work, Taft received reports about Sharretts. In a September 28, 1912 letter, Senator Frank Briggs of New Jersey wrote Taft directly to request that he intervene in the assignment of certain appraisals (related to pottery) to a subset of the Board that included Sharretts. Briggs requested that Taft “take steps which will secure a fair hearing of the case, which cannot be had before [the subset of the Board], as Mr. Sharretts’ attitude is already well known in all pottery matters.”<sup>240</sup> Two days later, Taft dispatched three letters. First, he wrote Franklin

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233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Letter from Chandler P. Anderson, Counselor for the U.S. State Dep’t, to William H. Taft, President of the U.S. (Sept. 30, 1912), *microformed on Taft Papers*, reel 361.

238. Letter from William H. Taft, President of the U.S., to Felix Frankfurter, Esquire, Bureau of Insular Affairs, U.S. War Dep’t (Oct. 17, 1912), *microformed on Taft Papers*, reel 515; Letter from Franklin MacVeagh, Sec’y of the U.S. Treasury, to Rudolph Forster (Oct. 12, 1912), *microformed on Taft Papers*, reel 361.

239. Letter from William H. Taft, President of the U.S., to Felix Frankfurter, Esquire, Bureau of Insular Affairs, U.S. War Dep’t (Oct. 17, 1912), *microformed on Taft Papers*, reel 514.

240. Letter from Frank O. Briggs, Senator from N.J., to William H. Taft, President of the U.S. (Sept. 28, 1912), *microformed on Taft Papers*, reel 447.

MacVeagh, his Secretary of the Treasury, that he had heard Sharretts had taken “an unjudicial attitude, made rulings, and reached a conclusion not justified by the evidence” in pottery-related matters.<sup>241</sup> In his letter, Taft remarked that he was aware that he could “remove for cause, and I am not sure that I cannot remove without cause, general appraisers, but I don’t want to do it without full consideration and full deliberation.”<sup>242</sup> Second, he wrote his Attorney General, George Wickersham, conveying substantially the same sentiments, both with respect to Sharretts, and with respect to his own authority to remove members of the Board.<sup>243</sup> Third, without waiting for a response from either MacVeagh or Wickersham, Taft wrote Henderson M. Somerville, the President of the Board, advising him that “[r]epresentations have been made to me in reference to the judicial fitness and qualification of Mr. Sharretts to sit in a case involving the appraisal of certain porcelains”—with “intimations” that were “sufficiently serious to justify a continuance of this case until I can confer with you, the Attorney General and the Secretary of the Treasury.”<sup>244</sup>

In short order, Taft began to hear from Sharretts’s supporters, who appeared to sense that Taft had him in the crosshairs. On October 11, 1912, Senator Winthrop “Murray” Crane wrote Taft that he had “learn[ed] that there is some opposition” to Sharretts, but that Sharretts had been “most helpful to the Finance Committee during the consideration of the Payne-Aldrich Bill.”<sup>245</sup> On October

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241. Letter from William H. Taft, President of the U.S., to Franklin MacVeagh, Sec’y of the U.S. Treasury (Sept. 30, 1912), *microformed on Taft Papers*, reel 514.

242. *Id.*

243. Letter from William H. Taft, President of the U.S., to George Wickersham, Attorney Gen. of the U.S., U.S. Dep’t of Justice (Sept. 30, 1912), *microformed on Taft Papers*, reel 514. On October 3, 1912, Wickersham responded that he had “referred” Sharretts’s case to the committee, but that “on the face of it, I could not quite see that there was enough to justify your exercising the power of removal.” Letter from George Wickersham, Attorney Gen. of the U.S., U.S. Dep’t of Justice, to William H. Taft, President of the U.S. (Oct. 3, 1912), *microformed on Taft Papers*, reel 361.

244. Telegram from William H. Taft, President of the U.S., to Henderson M. Somerville, President of the Bd. of Gen. Appraisers (Sept. 30, 1912), *microformed on Taft Papers*, reel 361. Taft “submit[ted] the matter to [Somerville’s] discretion whether a continuance ought not to be had.” *Id.*; *see also* Letter from Franklin MacVeagh, Sec’y of the U.S. Treasury, to Rudolph Forster (Oct. 24, 1912), *microformed on Taft Papers*, reel 447. On October 2, 1912, Somerville responded to the President that the case had been “heard and submitted before receipt” of the President’s letter, but that the “decision of the case has been postponed to November twentieth.” Telegram from Henderson M. Somerville, President of the Bd. of Gen. Appraisers, to William H. Taft, President of the U.S. (Oct. 2, 1912), *microformed on Taft Papers*, reel 361.

245. Letter from Winthrop M. Crane, U.S. Senator from Mass., to William H. Taft, President of the U.S. (Oct. 11, 1912), *microformed on Taft Papers*, reel 361. Taft responded to

12, 1912, Taft heard from Senator Henry Cabot Lodge, who said that he was “astonished at the mere suggestion” that Sharretts might be removed.<sup>246</sup> Lodge described Sharretts as “the best tariff expert in the country,” who could not be approached “in extensiveness, minuteness, and accuracy of knowledge” and who had “been called in by both parties whenever a general tariff revision was undertaken by Congress.”<sup>247</sup> Lodge remarked that Sharretts was a “Democrat in politics, so that I have no party prejudice in what I say,” but that he did “not believe that a greater injury could be done to the Customs Service than to remove Judge Sharretts from the Board.”<sup>248</sup> On November 4, 1912, Senator Nelson Aldrich wrote Taft that he knew “nothing of the nature of the charges” against Sharretts, but that he “would be very glad to have a talk with you with reference to Mr. Sharretts.”<sup>249</sup>

But Taft could not be swayed. The Committee proceeded, conducting a broad-ranging investigation and meeting with the members of the Board and “a large number of other persons.”<sup>250</sup> On January 31, 1913—after Taft had already lost the presidency in the election of 1912—the Committee held a public hearing on Sharretts’s conduct.<sup>251</sup> One news report observed that “[f]or the first time since the organization in 1890 of the Board of United States General Appraisers, a member of the Customs tribunal appeared . . . to answer the charge of malfeasance in office.”<sup>252</sup>

On February 15, 1913, the Committee issued a report on the “Procedure, Practice, Administrative Methods of the Board of

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Crane one week later to say: “The board of general appraisers is not doing well, and . . . [t]here are circumstances upon which suspicion of Sharretts is based, but I shall have a thorough and impartial investigation made and I hope it will do no man an injustice.” Letter from William H. Taft, President of the U.S., to Winthrop M. Crane, U.S. Senator from Mass. (Oct. 17, 1912), *microformed on Taft Papers*, reel 514.

246. Letter from Henry Cabot Lodge, U.S. Senator from Mass., to William H. Taft, President of the U.S. (Oct. 12, 1912), *microformed on Taft Papers*, reel 361.

247. *Id.*

248. *Id.* On the same day he wrote Crane, Taft wrote Lodge a letter with the same material points. Letter from William H. Taft, President of the U.S., to Henry Cabot Lodge, U.S. Senator from Mass. (Oct. 17, 1912), *microformed on Taft Papers*, reel 514.

249. Letter from Nelson Aldrich, U.S. Senator from R.I., to William H. Taft, President of the U.S. (Nov. 4, 1912), *microformed on Taft Papers*, reel 361.

250. PRESIDENT’S COMM. OF INQUIRY ON THE PROCEDURE, PRACTICE, ADMIN. METHODS & PERSONNEL OF THE BD. OF U.S. GEN. APPRAISERS, SEPARATE REPORT ON THE PERSONNEL 2 (Feb. 15, 1913) [hereinafter REPORT], *microformed on The Papers of Felix Frankfurter* (1983), reel 31 (Library of Cong.).

251. *U.S. Appraiser Under Fire*, WASH. POST, Jan. 31, 1913, at 5.

252. *Tried to Make Train Stop*, N.Y. TIMES, Feb. 1, 1913, at 10.

United States General Appraisers.”<sup>253</sup> On the same date, the Committee also issued a “Separate Report on the Personnel,” (“Report”)<sup>254</sup> which addressed “whether or not there ha[d] been within the meaning of the [statutory removal restriction] any neglect of duty, malfeasance in office, or inefficiency on the part of any member of the said Board.”<sup>255</sup>

The Report recommended that the President remove Sharretts, as well as a second appraiser, Roy Chamberlain, for both “neglect of duty” and “malfeasance in office.”<sup>256</sup> For Sharretts, the Report gave two reasons in two separate “specifications.”<sup>257</sup> First, the Report charged Sharretts with using “his official power to compel personal favors,” in particular from the Baltimore and Ohio Railroad Company.<sup>258</sup> To substantiate the charge, the Report cited a letter in which Sharretts had requested that a particular train leaving Chicago “stop on Sundays at Bradshaw when flagged to take on passengers for New York.”<sup>259</sup> In the letter, Sharretts had said that the train had stopped there for several years to “accommodate” him, because it was “largely through [his] influence” that various shippers used the Baltimore and Ohio Railroad Company to transport merchandise.<sup>260</sup> Sharretts noted that “unfortunate dock strikes” had compelled the shippers to divert their wares, but “after conditions become settled, [he was] convinced [he could] again induce the firms to return.”<sup>261</sup> The letter, thus, appeared to suggest a quid pro quo in which a train would stop at a particular point in

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253. PRESIDENT’S COMM. OF INQUIRY, REPORT OF THE COMMITTEE TO INQUIRE INTO THE PROCEDURE, PRACTICE, AND ADMINISTRATIVE METHODS OF THE BOARD OF UNITED STATES GENERAL APPRAISERS, S. DOC. NO. 63-7, at 2 (1913).

254. I reviewed a copy of this separate report, which was included in the papers of Felix Frankfurter at the Library of Congress. See REPORT, *supra* note 250. What exactly the report—an internal government document that Frankfurter had marked “confidential”—was doing there is something of a mystery.

255. *Id.* at 1. The Committee recommended that Somerville be asked to retire as Board President and that the President transfer the “Chief Clerk” of the Board to some other position. *Id.* at 1–2, 17. With respect to the former, the Report contended that a change should be made to take “the complicated and difficult administration of [the Board’s] affairs” out of the hands of Somerville, who was (the Report claimed) “no longer able to perform the duties of the presidency” due to “age and illness.” *Id.* at 2–3.

256. *Id.* at 1–2. The Report also recommended that a third general appraiser—Samuel B. Cooper—not be removed. See *id.* at 15–17.

257. *Id.* at 4–10.

258. *Id.* at 4.

259. *Id.*

260. *Id.*

261. *Id.*

exchange for “influence” with shippers to use the railroad. Sharretts responded with several defenses: that if he had influenced importers, it was many years ago when he was an appraiser of a local port with an incentive to boost that port’s traffic; that, at any rate, the railroad had not granted his request; that there was no impropriety in asking favors of importers; and that he had never actually asked importers any other favors.<sup>262</sup> But he could not rebut the face of the letter, which suggested that he would use “influence” on the importers (even if he had not in fact done so).<sup>263</sup> The Report thus contended that the letter was “the grossest impropriety and indicates an ethical standard totally unsuited to [Sharretts’s] official position.”<sup>264</sup>

The second specification was that Sharretts had “greatly diminished the usefulness of the Board and impaired confidence in it [by] . . . setting precedents for favorable decisions” in cases handled by his son, who litigated before the Board.<sup>265</sup> According to the Report, although Sharretts had recused himself from his son’s cases, he had “still controlled their decision by ruling” and setting “conclusive precedents” in other identical cases.<sup>266</sup> The Report suggested that the evidence that Sharretts knew he was influencing his son’s cases was “circumstantial,” but removal was nevertheless appropriate because it was “plainly incumbent upon the General Appraiser to take affirmative steps to ascertain whether his son ha[d] filed any identical protests.”<sup>267</sup> The Report also considered it not “material that in some instances [Sharretts’s] rulings may have been to some extent adverse to his son’s interest,” where they had been “[i]n the main . . . favorable.”<sup>268</sup> The Report also observed that nothing indicated that Sharretts “ha[d] been in any degree financially corrupt or that he ha[d] used his official position to further his son’s practice (beyond the effect automatically resulting from the condition) or that the son’s firm ha[d] used or attempted to use any such pressure to obtain practice before the Board.”<sup>269</sup>

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262. *Id.* at 5.

263. *See id.* at 4–5.

264. *Id.* at 5.

265. *Id.* at 6.

266. *Id.* at 6–8.

267. *Id.* at 9.

268. *Id.*

269. *Id.* at 10.

In terms of evidence, the Committee pointed to the “signifi- can[ce]” of the fact that other members of the Board had advised against the removal of another general appraiser, but that “none of them ha[d] made any appeal on behalf of General Appraiser Sharretts.”<sup>270</sup> “It seems,” the Report surmised, “that the other members of the Board have been scandalized by the conditions surrounding the son’s practice before the Board and that they consider it to have prejudiced the standing and usefulness of the Board.”<sup>271</sup> The Report also pointed to Sharretts’s “official methods,” which (the Committee claimed) had created “controversy and doubt” “for a great many years.”<sup>272</sup> Finally, the Report faulted Sharretts for “actually drafting the various tariff bills which were subsequently to come before him for construction, and affecting their policy,” rather than “merely serving as an impartial advisory expert to Committees of Congress.”<sup>273</sup>

The Report’s analysis of the legal standard was sparse. The Committee interpreted “malfeasance in office” to mean “misconduct,” “impropriety of conduct,” “maladministration,” or “misbehavior showing clear and flagrant disqualification and unfitness to exercise the office.”<sup>274</sup> The Committee analogized this standard to the “high crimes and misdemeanors” standard contained in the Constitution, which it claimed “has been construed as having this meaning.”<sup>275</sup>

As for Chamberlain, the Committee concluded that he should be removed for “incompetence,” because “his personal habits are such as to destroy his usefulness as a member of the Board” and “he has not the necessary qualifications for the performance of his duties.”<sup>276</sup> He was, in the Committee’s somewhat harsh language, “totally useless to the Board” because he was not a lawyer and lacked a “natural aptitude for [the] kind of [classification] work” that the Board conducted.<sup>277</sup> His opinions were “trifling in number and im-

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270. *Id.*

271. *Id.*

272. *Id.* at 11.

273. *Id.*

274. *Id.* at 12.

275. *Id.*

276. *Id.* at 13.

277. *Id.* The Committee did believe that Chamberlain was not “incompetent” as to the Board’s reappraisements, but believed it impossible to assign him exclusively to those functions. *Id.* at 14.

portance” and the Committee believed that “[c]ertain really important opinions” that appeared under Chamberlain’s name were in fact written by someone else.<sup>278</sup> Finally—and here the Report takes a darker turn—the Committee critiqued his use of “alcohol” which had “brought scandal upon the Board.”<sup>279</sup> The Committee thus recommended his dismissal for “incompetence”—a ground that nowhere appeared in the statutory standard, but likely falls most comfortably under “neglect of duty” or “inefficiency.”<sup>280</sup>

On March 3, 1913, Taft dismissed both Sharretts and Chamberlain using similar letters.<sup>281</sup> In his removal letters, Taft remarked that the Committee had “sustained” the charges and “advis[ed]” their removal “because of malfeasance in office” for Sharretts and “because of neglect of duty and inefficiency” for Chamberlain.<sup>282</sup> Taft declared that he had “approved” the “finding” and that, as a result, each was “hereby removed from [his] office.”<sup>283</sup>

The very next day—March 4, 1913—Taft left office.<sup>284</sup> Woodrow Wilson was now the President of the United States.<sup>285</sup>

### III. AFTERMATH AND IMPLICATIONS

#### A. *Aftermath*

In the immediate aftermath of the removals, Sharretts suggested that he would challenge Taft’s actions in court. He justified

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278. *Id.* at 13. As the Committee put it, “after examining [Chamberlain] concerning [those opinions] . . . [i]t was perfectly evident that he did not and could not have written them”—and they bore “internal evidence of having been written by another member of the Board.” *Id.*

279. *Id.* at 14 (“On one or two occasions he appears to have been actually intoxicated while on duty, though it has not often gone to that extent.”).

280. *See id.* at 13; *see also* Letter from William Wemple, Assistant Attorney Gen. of the U.S., U.S. Dep’t of Justice, to Winfred Denison, Assistant Attorney Gen. of the U.S., U.S. Dep’t of Justice (Feb. 25, 1913), *microformed on* Taft Papers, reel 361 (bringing to the attention of the Committee Sharretts’s service on panels affecting his son’s cases, and alleging that the “state of facts” was “so flagrant and so impudent” that the President should “not leave office without taking action on it”).

281. Letter from William H. Taft, President of the U.S., to Thaddeus S. Sharretts, Office of the Gen. Appraisers of Merch. (Mar. 3, 1913), *microformed on* Taft Papers, reel 516; Letter from William H. Taft, President of the U.S., to Roy Chamberlain, Office of the Gen. Appraisers of Merch. (Mar. 3, 1913), *microformed on* Taft Papers, reel 516.

282. *Id.*

283. *Id.*

284. *Appraisers Let Out on Taft’s Last Day*, N.Y. TIMES, Mar. 4, 1913, at 4.

285. *See id.*



his letter to the railroad as a mere request so that he could “be at [his] desk in New York the first thing Monday mornings,” which was “in the interest of the Government rather than [himself].”<sup>286</sup> As for the charges that he had decided cases to favor his son’s law firm, he took them up “in great detail, and justified his rulings as based on judicial and other precedents, as well as on the intent of Congress in framing the last three tariff acts.”<sup>287</sup> But he elected not to bring a legal challenge.<sup>288</sup> It was also suggested that President Woodrow Wilson might somehow seek to rescind the removals. But Wilson elected not to pursue that path, later announcing that he would not revisit the decision despite pressure from some senators.<sup>289</sup>

The Democrats did revisit tariff rates during the Wilson presidency, however, because the tariff had played a significant role in the presidential election of 1912.<sup>290</sup> Immediately upon taking office President Wilson convened a special session to deal with the matter, and the new Democratic majority in Congress enacted a bill (“Underwood-Simmons Bill”) in October 1913, thereby accomplishing “the most complete reversal of tariff policy which the United States had witnessed for half a century.”<sup>291</sup> Just four years after the enactment of the Payne-Aldrich Bill, the Underwood-Simmons Bill substantially lowered tariff rates almost across the board.<sup>292</sup>

To offset the decrease in customs revenues, the Underwood-Simmons Bill instituted an income tax—the first such tax under the Sixteenth Amendment, which had been ratified two months earlier.<sup>293</sup> Less than a year after the passage of the Underwood-Simmons Bill, World War I started, which scrambled the United States’ trade with other countries far more than any tariff could.<sup>294</sup> By the time the war was over, debates over the size and scope of

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286. *Sharretts to Fight*, N.Y. TIMES, Mar. 5, 1913, at 11.

287. *Tried to Make Train Stop*, *supra* note 252, at 10.

288. *See Webb Resolution Tabled*, *supra* note 156, at 13. The author has found no record that either Sharretts or Chamberlain challenged his removal.

289. *Banking, Financial, and Legislative News*, 96 COM. & FIN. CHRON. 834, 834–35 (1913); *Wilson Upholds Taft*, L.A. TIMES, Mar. 12, 1913, at 11; *Won't Help Ex-Appraiser*, WASH. POST, Mar. 12, 1913, at 14.

290. ASHLEY, *supra* note 95, at 258.

291. *Id.* at 258–59.

292. KAPLAN & RYLEY, *supra* note 88, at 49–51.

293. *Id.* at 51.

294. ASHLEY, *supra* note 95, at 263–64.

the federal government's taxing authority would center on the income tax, leaving the principal rationale for a tariff the same one that Alexander Hamilton had given over a century earlier—protection of American industry.<sup>295</sup>

The significance of this tariff revision was thus short-lived. In the future, the income tax would be the primary locus of contention in debates over the size, scope, and powers of the federal government.

The various actors in the drama went in different directions. William Loeb tendered his resignation as Collector of the Post of New York to President Wilson and retired to a life in private industry.<sup>296</sup> Felix Frankfurter stayed in Washington, D.C., for a few months.<sup>297</sup> On June 12, 1913, Winfred Denison wrote to Edward H. Warren, a friend and professor at Harvard Law School, asking him whether he was aware of “any reasonable opening in your faculty for Frankfurter.”<sup>298</sup> After funds were raised to endow a professorship at Harvard Law School, Frankfurter decamped to Cambridge, where (with brief interludes) he remained until his appointment as Associate Justice of the Supreme Court in 1939.<sup>299</sup>

Taft, by contrast, moved to Yale Law School, where he became the Kent Professor of Law and wrote a treatise on presidential power, *Our Chief Magistrate and His Powers*.<sup>300</sup> When Warren Harding was elected President, he nominated Taft to be Chief Justice of the United States Supreme Court, where he would go on to write *Myers*.<sup>301</sup>

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295. See DOBSON, *supra* note 18, at 1 (observing that the “importance of the revenue-raising aspect of tariffs has declined markedly in the period since 1913” when the Sixteenth Amendment to the Constitution was ratified, with customs duties shrinking since that era from between fifty and ninety percent to one or two percent, of federal income). Wilson vetoed a tariff bill before leaving office in 1921, but Harding signed bills raising rates in both 1921 and 1922. KAPLAN & RYLEY, *supra* note 88, at 100–02, 119.

296. *Loeb Quits as Collector*, CHI. DAILY TRIB., Mar. 4, 1913, at 16.

297. HIRSCH, *supra* note 10, at 39.

298. BAKER, *supra* note 10, at 41.

299. *Id.* at 41, 49, 213; see U.S. GOV'T PRINTING OFFICE, 88TH CONG., 1ST SESS., OFFICIAL CONGRESSIONAL DIRECTORY 615 (1963); HIRSCH, *supra* note 10, at 38, 40–41; HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912–1934, at 14 (Robert M. Mennel & Christine L. Compston eds., 1996).

300. JOINT COMM. ON PRINTING, 67TH CONG., 3D SESS., OFFICIAL CONGRESSIONAL DIRECTORY 393 (1922).

301. *Id.*

Winfred Denison served for two years in the colonial administration of the Philippines.<sup>302</sup> Tragically, despairing at his ill health, he later killed himself by jumping in front of a Manhattan subway train in 1919.<sup>303</sup>

### B. *Implications*

Finally, this part considers three overarching implications from the creation and development of the Board generally and from Taft's 1913 dismissal of Sharretts and Chamberlain specifically. First, the entire history illuminates present-day understandings of the development of the administrative state. Second, the involvement of Taft and Frankfurter in the events of 1912 and 1913 casts light on the three major opinions decided by the Supreme Court—*Myers*, *Humphrey's Executor*, and *Wiener*—in the first half of the twentieth century. Third, Taft's application of the "inefficiency, neglect of duty, or malfeasance in office" standard has bearing for interpreting congressional enactments that contain the same terms.

#### 1. Institutional Design

The creation of the Board of General Appraisers demonstrates the close connection between the adoption of for-cause removal provisions in the late-nineteenth century with the corresponding attempt to create administrative boards to adjudicate disputes. Like the Interstate Commerce Act, which was enacted just three years earlier and created the Interstate Commerce Commission, the Customs Administrative Act provided that the President could remove members of the Board for "inefficiency, neglect of duty, or malfeasance in office."<sup>304</sup> The debate surrounding the adoption of this statute reflected deep constitutional divisions about whether Congress could eliminate preexisting judicial and jury trial rights and lodge final decision-making authority in an administrative body.

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302. See SNYDER, *supra* note 8, at 77–79 (observing that President Wilson nominated Denison to be an official in the governing institutions of the Philippines and that his confirmation was controversial because he had created "enemies while investigating the Board of Appraisers").

303. *Winfred T. Denison Commits Suicide: Former United States Assistant Attorney General Jumps in Front of Subway Train*, N.Y. TIMES, Nov. 6, 1919, at 16.

304. Customs Administrative Act of 1890, ch. 407, § 12, 26 Stat. 131, 136.

Both of these constitutional questions—the lawfulness of restrictions on presidential removal and the scope of Congress’s authority to shift disputes from judicial to administrative adjudication—remain hotly debated today. As the history of the Board demonstrates, these two ideas grew up in tandem. It was only natural for congressional representatives worried about the elimination of Article III lawsuits to live with the accommodation provided by good-cause removal restrictions.

The post-1913 development of the Board demonstrates the close connection even more starkly. Treasury Secretary MacVeagh transmitted the Committee’s Report to the incoming Wilson Administration, recommending “[r]adical changes in the structure of the Board.”<sup>305</sup> In 1926—the same year that the Court was to decide *Myers*, Congress changed the name of the Board of General Appraisers to the United States Customs Court.<sup>306</sup> Three decades later, in 1956, Congress vested the court with Article III status by formally giving its members the tenure and salary protections required by Article III.<sup>307</sup> In 1980, Congress retained the Court’s Article III status and renamed it the United States Court of International Trade, which is the form and title that it retains.<sup>308</sup> As a consequence, the Board was one of the few non-Article III adjudicatory tribunals within the executive branch to transition fully to Article III status, where it remains today.

## 2. *Myers*, *Humphrey’s Executor*, and *Wiener*

It is a fascinating coincidence that Taft and Frankfurter—two towering figures in twentieth-century American legal history—played such a pivotal role in the removal of Sharretts and Chamberlain. After all, as Supreme Court Justices, they would go on to author two of the pivotal early twentieth-century opinions on the President’s removal power. Taft wrote the 1926 opinion in *Myers*, while Frankfurter wrote the 1958 opinion in *Wiener*.<sup>309</sup> In between

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305. *Changes Urged in the Form of U.S. Appraisers Board*, WALL STREET J., Mar. 14, 1913.

306. Act of May 28, 1926, ch. 411, § 1, 44 Stat. 669, 669; see also *Ex parte Bakelite Corp.*, 279 U.S. 438, 457–58 (1929) (commenting on the constitutional status of the Customs Court).

307. Act of July 14, 1956, Pub. L. No. 84-703, 70 Stat. 532.

308. Act of Oct. 10, 1980, Pub. L. No. 96-417, 94 Stat. 1727; see FALLON, JR. ET AL., *supra* note 24, at 34.

309. *Wiener v. United States*, 357 U.S. 349, 349 (1958); *Myers v. United States*, 272 U.S.

these two cases, Justice George Sutherland wrote the Court's opinion in *Humphrey's Executor*.<sup>310</sup> None of the three opinions expressly mentions the events of 1912 and 1913. But thanks to the Court's early encounter with the Board in *Shurtleff*, all three cases confronted the constitutionality of the Board's administrative structure.

Consider *Myers*. Commentators have often remarked that Chief Justice Taft, the author of the Court's *Myers* opinion, had previously served as President. Indeed, Justice Frankfurter—writing for the Court in *Wiener*—made the point, noting that the Court in *Myers* had spoken “through a Chief Justice who himself had been President.”<sup>311</sup> In *Myers*, Taft observed that, under *Shurtleff*, provisions stating that the President may remove an officer for “inefficiency, neglect of duty, or malfeasance in office” such as the one Congress initially enacted in the Customs Administrative Act did not limit the President's removal authority. According to *Myers*:

Since the provision for an Interstate Commerce Commission, in 1887, many administrative boards have been created whose members are appointed by the President, by and with the advice and consent of the Senate, and in the statutes creating them have been provisions for the removal of the members for specified causes. Such provisions are claimed to be inconsistent with the independent power of removal by the President. This, however, is shown to be unfounded by the case of *Shurtleff v. United States*, 189 U.S. 311 (1903).<sup>312</sup>

In dissent, Justice Brandeis agreed. He observed that, under *Shurtleff*, provisions simply authorizing removal for “inefficiency, neglect of duty, or malfeasance in office” did not restrict “the President's power to remove for other than the causes specified.”<sup>313</sup> Through *Shurtleff*, the Board provided a backdrop against which the Court understood the removal restriction at issue in *Myers*. It also forced both Chief Justice Taft and Justice Brandeis to confront the constitutionality of good-cause restrictions, even though the kind of restriction at issue in *Myers* required the Senate's advice and consent before presidential removal.

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52, 106 (1926).

310. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618 (1935).

311. *Wiener*, 357 U.S. at 351.

312. *Myers*, 272 U.S. at 171.

313. *Id.* at 262 n.30 (Brandeis, J., dissenting); *see id.* at 177 (Holmes, J., dissenting); *id.* at 181 (McReynolds, J., dissenting).

In *Humphrey's Executor*, Justice Sutherland spent a significant portion of the opinion distinguishing *Shurtleff's* holding. Unlike the provision governing the Board that Taft and Frankfurter confronted in 1912 and 1913—after Congress had amended the Customs Administrative Act by the 1908 Act to make the three statutory removal bases exclusive—the removal provision governing the FTC was identical to the removal provision considered by the Court in *Shurtleff*.<sup>314</sup> Indeed, in its brief to the Court in *Humphrey's Executor*, the United States government expressly relied on the Court's construction in *Shurtleff* of the “inefficiency, neglect of duty, or malfeasance in office” language and relied on Congress's subsequent change to the language in the 1908 Act.<sup>315</sup> The government pointed out that—following *Shurtleff*—Congress in the 1908 Act “amended the Customs Administrative Act to provide expressly that a removal could be made for one of the stated causes and for no other.”<sup>316</sup> And the government relied on the timeline—the decision in *Shurtleff* in 1903, Congress's amendment to the removal restriction for the Board in 1908, and Congress's use of the same language at stake in *Shurtleff* in the Federal Trade Commission Act in 1914—in an attempt to demonstrate that Congress did not intend to limit the President's authority to remove commissioners to the three listed causes.<sup>317</sup>

Based on this timeline, the government contended that “Congress was aware of the construction given to the [Customs Administrative] Act by this Court” in *Shurtleff* in 1903, when it amended the Act in 1908, and when it created the FTC in 1914.<sup>318</sup> The government contended that the reasoning of *Shurtleff* was understood to be applicable to the FTC by the majority and dissenting opinions in *Myers*, notwithstanding that the members of the Board were subject to no term and the commissioners were subject to a seven-

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314. See *Humphrey's Ex'r*, 295 U.S. at 621–23.

315. Brief for the United States at 6, *Humphrey's Ex'r*, 295 U.S. 602 (No. 667).

316. *Id.*

317. See *id.* at 11–12.

318. *Id.* at 13. The government listed a series of statutes that, like the 1908 Act, restricted the President's removal power to the three specified causes “and no others.” See *id.* at 6, 13; see also Act of June 21, 1934, ch. 691, sec. 4, § 4, 48 Stat. 1185, 1193–94 (National Mediation Board); Act of May 20, 1926, ch. 347, § 4, 44 Stat. 577, 579 (Board of Mediation); Act of June 2, 1924, ch. 234, § 900(a), (b), 43 Stat. 253, 336 (Board of Tax Appeals); Act of Mar. 4, 1923, ch. 248, § 1, 42 Stat. 1446, 1446 (United States Coal Commission); Act of Feb. 28, 1920, ch. 91, §§ 304, 306(b), 41 Stat. 456, 470 (Railroad Labor Board); Act of July 15, 1913, ch. 6, § 11, 38 Stat. 103, 108 (creating a Commissioner of Mediation and Conciliation).

year term.<sup>319</sup> And the government contended that the FTC and the Board were “strikingly similar in the relevant essentials of organization and functions,” in that the Board was established to be a “disinterested tribunal to pass upon” controversies arising out of contested appraisals.<sup>320</sup>

It was to no avail—perhaps surprisingly, given that Sutherland was present for the legislative debates in the Senate in both 1908 and 1914. Sutherland’s opinion for the Court in *Humphrey’s Executor* made no mention of Congress’s amendments to the removal provision governing the Board.

Finally, in *Wiener*, Justice Frankfurter’s opinion for the Court pivoted almost 180 degrees from Chief Justice Taft’s opinion for the Court in *Myers*—inferring, as a matter of congressional intent, that quasi-judicial officers are presumptively removable only for cause even when a statute fails to include an express for-cause removal provision.<sup>321</sup> As the government argued in the case, that result was wholly inconsistent with *Shurtleff*, which required clear statutory language for Congress to limit the President’s power to remove “judges” comprising administrative bodies like the Board.<sup>322</sup> Frankfurter’s opinion ignored *Shurtleff*, a case that was the backdrop against which the removals of 1913 occurred.<sup>323</sup>

Understanding why is no easy task. Above all, *Wiener* displays a confidence that the Court can easily distinguish between “executive” officers and “quasi-judicial” officers, thus allowing it (rather than Congress) to be the final arbiter on whether a particular statutory scheme limits presidential removal. Since *Wiener*, the tide has receded, with cases like *Morrison v. Olson* all but abandoning the project of distinguishing between “executive” and “quasi-judicial” officers. Statutory text, as a result, plays more of a role in determining the President’s removal authority than *Wiener* suggests.

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319. Brief for the United States at 14–15, *Humphrey’s Ex’r*, 295 U.S. 602 (No. 667).

320. *Id.* at 17.

321. *Wiener v. United States*, 357 U.S. 349, 352, 356 (1958).

322. Brief for the United States at 31–32, *Wiener*, 357 U.S. 349 (No. 52).

323. *See generally Wiener*, 357 U.S. 349 (containing no discussion of *Shurtleff*).

### 3. “Inefficiency, Neglect of Duty, or Malfeasance in Office”

Finally, Taft’s firing of Sharretts and Chamberlain casts light on the meaning of the terms “inefficiency, neglect of duty, or malfeasance in office.” To this day, Congress frequently uses that language in an attempt to create agency “independence” from presidential control, despite its unsettled meaning. Taft’s (and Frankfurter’s) interpretation of the relevant language has implications for the present-day understanding of those statutory terms.

First, as to process: Taft’s actions in 1913 appear to establish a precedent demonstrating the procedures for notice and a hearing that would meet any requirements that might be understood to be imposed by constitutional or statutory law. Specifically, Taft’s use of a committee to provide process to Sharretts and Chamberlain indicates that the kind of hearing that might be required (assuming that one is) before an officer removal is not a personal hearing before the President.<sup>324</sup>

Second, as to the substance of the statutory standards: the Taft precedent of 1912 and 1913 provides a unique executive branch gloss on the terms “inefficiency, neglect of duty, or malfeasance in office.” Consider, for example, the recent opinions in the D.C. Circuit case of *PHH Corp. v. Consumer Financial Protection Bureau*. An extensive concurring opinion in that case by Judge Thomas Griffith starts with a “fundamental question: How difficult is it for the President to remove the Director?”<sup>325</sup> The opinion canvassed sources that might provide evidence of the meaning of the statute protecting the Director of the Consumer Financial Protection Bureau from removal by the President—which includes the identical “inefficiency, neglect of duty, or malfeasance in office” language in the Board of General Appraisers statute.<sup>326</sup> To interpret that language, Judge Griffith’s opinion focused on dictionary definitions of the statutory terms, state-law cases, and legislative debates to understand these terms.<sup>327</sup> But neither Judge Griffith’s opinion, nor, for that matter, any of the academic commentary, has focused on

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324. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 135 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring) (“Although the Supreme Court has not defined the precise contours of this process, there is little reason to think it would impose an onerous burden on the President.”).

325. *Id.* at 124.

326. *Id.* at 130–34.

327. *Id.* at 131–32 & nn.10–12, 133.



the meaning that executive branch practice has given the “inefficiency, neglect of duty, or malfeasance in office” language.<sup>328</sup>

That lacuna is significant because it is well-established that executive branch practice informs the meaning of legal text implicating the separation of powers.<sup>329</sup> Taft’s removal of Sharretts and Chamberlain thus provides a crucial data point on this statutory question, given the rarity with which presidents have removed officers “for cause.” Indeed, after the Court’s opinion in *Humphrey’s Executor*, only one President has done so. In 1969, President Richard Nixon fired Raymond Lapin from his post as President of the Federal National Mortgage Association—otherwise known as “Fannie Mae.”<sup>330</sup> At the time, the President of the *United States* could remove the President of *Fannie Mae* only for “good cause.”<sup>331</sup> Without conducting a hearing, Nixon sent Lapin a letter saying:

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328. A small body of academic literature addresses the meaning of these terms. See, e.g., Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 110–12 (1994) (“Purely as a textual matter . . . ‘inefficiency, neglect of duty, or malfeasance in office’ seem best read to grant the President at least something in the way of supervisory and removal power—allowing him, for example, to discharge, as inefficient or neglectful of duty, those commissioners who show lack of diligence, ignorance, incompetence, or lack of commitment to their legal duties . . . [or to] discharge commissioners who have frequently or on important occasions acted in ways inconsistent with the President’s wishes with respect to what is required by sound policy.”); John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999) (contending that the “good cause” removal provision in the independent-counsel statute should be read to permit removal for insubordination to avoid a “serious constitutional question”); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 86–87 (arguing for a broad interpretation of for-cause removal provisions); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 30 (1995) (understanding the terms “inefficiency” and “neglect of duty” to permit removal where an officer is “incompetent [due to] consistently foolish policy choices”); Lindsay Rogers, *The Independent Regulatory Commissions*, 52 POL. SCI. Q. 1, 7–8 (1937) (predicting “[n]o ‘institutional consequences’ . . . from the *Humphrey* case” because the statutory standard imposes a low burden on Presidents); Paul R. Verkuil, *The Status of Independent Agencies After Bowsher v. Synar*, 1986 DUKE L.J. 779, 797 n.100 (noting that the removal standard “could be construed so as to encompass a general charge of maladministration, in which event even if the terms of removal are deemed to be exclusive they could still be satisfied by a removal by the President on the ground of policy incompatibility”).

329. *NLRB v. Noel Canning*, 573 U.S. \_\_\_, \_\_\_, 134 S. Ct. 2550, 2559 (2014) (placing “significant weight upon historical practice” in interpreting constitutional provisions that “concern the allocation of power between two elected branches of Government”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (“Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.”); see also Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 912 (2017).

330. See BREGER & EDLES, *supra* note 9, at 155 (recounting this episode).

331. Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 810(b)(2), 82 Stat. 476, 546 (1968).

“You are hereby removed for good cause.”<sup>332</sup> Nixon’s letter informed Lapin that he was being removed because his “policies and practices” were “inconsistent with the objectives of applicable law and with the standards expected of officials holding positions of trust and confidence under the laws of the United States.”<sup>333</sup> But it provided no further elaboration. Lapin denounced Nixon’s action as “illegal” and initiated, but then dropped, a legal challenge to his removal.<sup>334</sup>

During the events of 1912 and 1913, by contrast, the Committee did specify the reasons for the removals. In this regard, it is telling that the Committee appeared to convict Sharretts on suspicion that he used his “official power to compel personal favors” in the form of getting a train to stop at a convenient location and that he had set “precedents for favorable decisions of his son’s cases.”<sup>335</sup> Those charges of self-dealing certainly appear serious, but the Committee’s judgment on this issue is important not only because of the standard it imposed, but also because of the Committee’s implicit assumption that it was qualified to weigh and to judge the conflicting evidence. Specifically, with respect to the second charge, the Report conceded that the evidence against Sharretts was “circumstantial.”<sup>336</sup> In this regard, the Committee acknowledged that Sharretts could bring forth some evidence to support his position. But the Report suggests that, while evidence must exist to meet the statutory standards, countervailing evidence may also exist, allowing the executive finder of fact to weigh the facts.

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332. Murray Seeger, *Nixon Fires Housing Mortgage Chief but He Refuses to Go*, L.A. TIMES, Dec. 3, 1969, at 1.

333. *Id.* at 24.

334. *Id.*; *Lapin Drops Action Over FNMA Post*, WASH. POST TIMES HERALD, Feb. 17, 1970, at D12. According to news reports, George Romney, the Secretary of Housing, had advised the President that the relationship between his department and Fannie Mae had “ceased” and could be restored solely by Lapin’s removal. *See* Seeger, *supra* note 332, at 1, 24. Fannie Mae’s board of directors had unanimously recommended Lapin’s removal. *See id.* at 24; *see also* JAMES R. HAGERTY, THE FATEFUL HISTORY OF FANNIE MAE: NEW DEAL BIRTH TO MORTGAGE CRISIS FALL 43–46 (2012); Robert B. Semple, Jr., *Nixon Dismisses Mortgage Chief; Fight Is Planned*, N.Y. TIMES, Dec. 2, 1969, at 1 (observing that Nixon’s letter did not elaborate on what he meant by “good cause” or on the charges against Lapin).

335. REPORT, *supra* note 250, at 4, 6.

336. *Id.* at 9.

With respect to Chamberlain, the charge was “incompetence,” because he lacked the “qualifications for the performance of his duties” or the “natural aptitude” for the Board’s work.<sup>337</sup> In this respect, the Committee’s Report suggests that a President can meet the removal standard when an officer, by some metric, is simply not good at his job.

To be sure, Taft’s for-cause removal of the general appraisers is only *one* historical data point among many that may collectively be assembled to establish the meaning, in context, of the statutes that create the “independent” agencies. In an area where executive branch practice is given significant weight, however, it is a crucial, singular data point that ought to inform executive branch and judicial understanding of the “inefficiency, neglect of duty, or malfeasance in office” standard in the future.

#### CONCLUSION

This article has explored a fascinating moment in the history of the American presidency: William Howard Taft’s for-cause removal of two members of the Board of General Appraisers on the very last day that he was in office. Now obscure, the Board once wielded significant authority during an era when tariffs were the major source of revenue for the federal government. The development of the Board provided significant precedents—the Supreme Court’s decision in *Shurtleff* and President Taft’s decision to dismiss Sharretts and Chamberlain—for the President’s removal power. The decision makers during the events of 1912 and 1913—William Howard Taft and a young Felix Frankfurter—went on to become Supreme Court Justices and to write two of the most important precedents on the President’s authority to remove subordinates, *Myers* and *Wiener*. Finally, Taft’s actions and the record from the events of 1912 and 1913 cast important light on the statutory language “inefficiency, neglect of duty, or malfeasance in office,” which Congress still uses to mark some kind of agency “independence” from presidential control.

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337. *Id.* at 13.